TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 346

MATSON NAVIGATION COMPANY, THE OCEANIC STEAMSHIP COMPANY AND MATSON TERMINALS, INC., APPELLANTS,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

FILED AUGUST 6, 1935.

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[fol. 1] [File endorsement omitted]

[fol. 2]

IN SUPREME COURT OF THE UNITED STATES,

October Term, 1935

MATSON NAVIGATION COMPANY, a Corporation, THE OCEANIC STEAMSHIP COMPANY, a Corporation, and Matson Terminals, Inc., a Corporation, Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, John C. Corbett, Fred E. Stewart, R. E. Collins, H. G. Cattell and Ray L. Riley, the Members of Said State Board of Equalization, and Charles J. McColgan, Franchise Tax Commissioner of the State of California

Petition for Appeal, Assignment of Errors and Prayer for Reversal—Filed June 17, 1935

PETITION FOR APPEAL

Considering themselves aggrieved by the final decision of the Supreme Court of the State of California in the above-entitled cause, the petitioners in said cause, Matson Navigation Company, The Oceanic Steamship Company, and Matson Terminals, Inc., hereby pray that an appeal be allowed to the Supreme Court of the United States in said cause, and that an order be made fixing the amount of cost and supersedeas bond thereon, and in support thereof [fol. 3] allege that in said cause the validity of the Bank and Corporation Franchise Tax Act of the State of California was questioned on the ground that it is repugnant to the Constitution of the United States and that said decision was in favor of the validity thereof.

ASSIGNMENT OF ERRORS

And the said Matson Navigation Company, The Oceanic Steamship Company and Matson Terminals, Inc., make the following assignments of error:

The Supreme Court of the State of California erred in rendering its said decision and in making its order affirm-

ing the order of the State Board of Equalization referred to therein, in each of the respects hereinafter stated, that is to say, the said court erred in affirming said order of the State Board of Equalization and in thereby making each of the following holdings:

(1) That said decision of the Board of Equalization did not violate the Constitution of the United States;

(2) That the State Bank and Corporation Franchise Tax Act (California Stats. 1929, Chapter 13, as amended, California Stats. 1929, Chapter 781) is not repugnant to the Constitution of the United States;

(3) That said act does not tax the privilege of doing interstate and foreign business, although it imposes a tax [fol. 4] on the privilege of doing business measured in part by net income derived from interstate and foreign business;

(4) That said act does not violate Section 8 of Article I of the Constitution of the United States, although it imposes a tax on the privilege of doing business in interstate and foreign commerce;

(5) That said act does not deny to petitioners the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, although it imposes a tax on the privilege of doing interstate and foreign commerce;

(6) That said act does not deprive petitioners of their property without due process of law and without just or any compensation, although it imposes a tax on the privilege of doing interstate and foreign commerce;

(7) That said act does not burden interstate and foreign commerce in violation of Section 8 of Article I of the Constitution of the United States, although it imposes a tax on the privilege of doing business measured in part by net income derived by petitioners from interstate and foreign business;

(8) That said act does not deny to petitioners the equal protection of the laws guaranteed by the Fourteenth Amendment to the Constitution of the United States, although it imposes a tax for the privilege of doing business [fol. 5] measured in part by net income derived from interstate and foreign business;

(9) That said act does not deprive the petitioners of their property without due process of law and without just or any compensation in violation of the Fourteenth Amendment to the Constitution of the United States, although it imposes a tax on the privilege of doing business measured in part by net income derived by petitioners from interstate and foreign business;

(10) That said act does not burden interstate and foreign commerce in violation of Section 8 of Article I of the Constitution of the United States, although it imposes a tax on the privilege of doing business within the state measured in part by net income derived from interstate and foreign business caried on therein;

(11) That said act does not deny to petitioners the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, although it imposes a tax for the privilege of doing business within the state measured, in part, by net income derived by the taxpayer from interstate and foreign business carried on therein;

(12) That said act does not deprive the petitioners of their property without due process of law and without just or any compensation, in violation of the Fourteenth Amendment to the Constitution of the United States, although it [fol. 6] imposes a tax on the privilege of doing business within the state, measured, in part, by income derived from interstate and foreign business carried on therein;

(13) That said act is valid when applied to interstate and foreign transportation business;

(14) That said act is valid when applied to include, within the measure thereof, income from interstate and foreign transportation business.

(15) That said act does not deny to petitioners the equal protection of the laws, although, as a condition of the right to do intrastate business, it imposes a tax measured in part by income from interstate and foreign business carried on within the boundaries of the state.

Prayer for Reversal

For which errors the petitioners, Matson Navigation Company, The Oceanic Steamship Company and Matson

Terminals, Inc., pray that the said judgment of the Supreme Court of the State of California, dated March 27, 1935, in the above-entitled cause, be reversed, and a judgment rendered in favor of the petitioners, and that the petitioners be awarded their costs.

[fol. 7] Dated: June 17th, 1935.

Herman Phleger, Maurice E. Harrison, Howard J. Linn, Gregory A. Harrison, Attorneys for Petitioners.

[fol. 8] [File endorsement omitted.]

[fol. 9] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER ALLOWING APPEAL—Filed June 17, 1935

The Appellants in the above-entitled cause having prayed for an order allowing an appeal in said cause to the Supreme Court of the United States from the judgment made and entered in said cause by the Supreme Court of the State of California on the 27th day of March, 1935, and from each and every part thereof, and having presented their petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and [fol. 10] provided, and the decision of the Supreme Court of the State of California in said cause having been in favor of the validity of the Bank and Corporation Franchise Tax Act of the State of California under the Constitution of the United States, the validity of said act having been drawn in question in said cause upon the ground of its being repugnant to the Constitution of the United States,

It is now here ordered that an appeal be, and the same hereby is, allowed to the Supreme Court of the United States from the Supreme Court of the State of California in the above-entitled cause, as provided by law;

And it is further ordered that the Clerk of the Supreme Court of the State of California shall prepare and certify a transcript of the record, proceedings and judgment in this

cause and transmit the same to the Supreme Court of the United States, so that he shall have the same in said Court within sixty (60) days of this date;

And it is further ordered that the amount of the cost and supersedeas bond on said appeal herein be, and the same hereby is, fixed in the sum of $39,274.34.

Dated: June 17, 1935.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

[fols. 11-13] Citation in usual form showing service on H. H. Linney, filed June 17, 1935, omitted in printing.

[fol. 14] [File endorsement omitted.]

[fol. 15] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER STAYING PROCEEDINGS—Filed June 21, 1935

The appellants in the above-entitled suit having filed therein their petition for an order allowing appeal to the Supreme Court of the United States, together with their assignment of errors and prayer for reversal, and having obtained an order allowing said appeal, and the amount of the cost and supersedeas bond on said appeal having been fixed in the sum of $39,274.34, and the appellants having filed in said suit a good and sufficient cost and supersedeas bond duly approved in said sum.

It is hereby ordered that all further proceedings in the [fol. 16] above-entitled suit be and the same hereby are suspended and stayed until the final determination of said appeal by the Supreme Court of the United States.

Dated: June 21st, 1935.

William H. Waste, Chief Justice of the Supreme Court of the State of California.

[fol. 17] Due service and receipt of a copy of the within is hereby admitted this 21st day of June, 1935. U. S. Webb by H. H. Linney, Attorney for Respondents.

[fol. 18] [File endorsement omitted]

[fol. 19] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

STIPULATION AS TO CONTENTS OF TRANSCRIPT OF RECORD—Filed June 21, 1935

It is hereby stipulated that the transcript of record to be filed in the Supreme Court of the United States, pursuant to the appeal heretofore allowed herein, shall include the following:

(1) Petition for Writ of Review.

(2) Order for Issuance of Writ of Review.

H. P., M. E. H., G. A. H., H. J. F., U. S. W., H. H. L.

(4) Record of State Board of Equalization, certified to the Supreme Court of the State of California, pursuant to writ of review, including:

[fol. 20] (a) Certificate of the Secretary of the State Board of Equalization;

(b) Appeal to the State Board of Equalization, including Consolidated Return attached to the Appeal as Exhibit "A," Notice of Additional Franchise Tax Proposed to be Assessed, attached to the Appeal as Exhibit "B," and Notice of Action of Franchise Tax Commissioner upon Taxpayer's Protest attached to the Appeal as Exhibit "C";

(c) Minutes of the State Board of Equalization upon the hearing of the Appeal;

(d) Opinion of the State Board of Equalization;

(e) Order of the State Board of Equalization sustaining the action of the Franchise Tax Commissioner.

(5) Stipulation as to Facts.

(6) Opinion of the Supreme Court of the State of California.

(7) Minute order of the Supreme Court of the State of California affirming the order of the State Board of Equalization;

(8) Petition for Rehearing;

(9) Order of the Supreme Court of the State of California denying petition for rehearing;

(10) Petition for Appeal, Assignment of Errors and Prayer for Reversal;

(11) Statement as to Jurisdiction on Appeal;

(12) Order Allowing Appeal;

[fol. 21] (13) Notice under Rule 12, Paragraph 2, Rules of the Supreme Court of the United States, and Proof of Service;

(14) Citation;

(15) Supersedeas and Cost Bond;

(16) Stay of Proceedings.

(17) Stipulation as to Contents of Transcript of Record.

Dated: June 21, 1935.

Herman Phleger, Maurice E. Harrison, Gregory A. Harrison, Howard J. Finn, Attorneys for Appellants.

U. S. Webb, Attorney General of the State of California, by H. H. Linney, Deputy Attorney General.

[fols. 22-27] Supersedeas bond on appeal for 39,274.34 approved and filed June 21, 1935, omitted in printing.

[fol. 28] [File endorsement omitted]

[fol. 29] IN SUPREME COURT OF CALIFORNIA

No. —

MATSON NAVIGATION COMPANY, a Corporation, THE OCEANIC STEAMSHIP COMPANY, a Corporation, and Matson Terminals, Inc., a Corporation, Petitioners,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, John C. Corbett, Fred E. Stewart, R. E. Collins, H. G. Cattell and Ray L. Riley, the Members of said State Board of Equalization, and Charles J. McColgan, Franchise Tax Commissioner of the State of California, Respondents

PETITION FOR WRIT OF REVIEW—Filed Mar. 29, 1934

To the Honorable, the Supreme Court of the State of California:

The above-named Petitioners, Matson Navigation Company, The Oceanic Steamship Company and Matson Terminals, Inc., respectfully pray for a writ of review of this court by this verified petition, and in this behalf set forth [fol. 30] the following causes for the issuance of said writ:

I

At all times herein mentioned said Respondents John C. Corbett, Fred E. Stewart, R. E. Collins, H. G. Cattell and Ray L. Riley were, and still are, the duly appointed, qualified and acting members of the State Board of Equalization of the State of California. At all times herein mentioned Charles J. McColgan was, and still is, the duly appointed, qualified and acting Franchise Tax Commissioner of the State of California.

II

Your Petitioners now are and at all times herein mentioned have been corporations duly organized and existing under and by virtue of the laws of the State of California.

III

Your Petitioner Matson Navigation Company was, during the period from January 1, 1930, to December 31, 1930, inclusive, now is, and at all other times herein mentioned has been, engaged in the operation of vessels transporting passengers and freight between ports on the Pacific Coast of the United States and ports in the Territory of Hawaii.

IV

Your Petitioner The Oceanic Steamship Company was, during the period from January 1, 1930, to December 31, 1930, inclusive, now is, and at all other times herein mentioned has been, engaged in the operation of vessels trans- [fol. 31] porting passengers and freight between ports on the Pacific Coast of the United States and ports in the Territory of Hawaii, the South Seas, Australia and New Zealand.

V

During said period from January 1, 1930, to December 31, 1930, inclusive, your Petitioners derived from the trans-

portation of passengers and freight as aforesaid, a net income in the amount of $2,526,148.22; that 22.2% of said amount of $2,526,148.22 was derived from the transportation of passengers and freight initiated at ports of the State of California and carried to ports in the Territory of Hawaii, the South Seas, Australia and New Zealand.

VI

On or about March 16, 1931, your Petitioners filed with the State Franchise Tax Commissioner a consolidated franchise tax return for the year 1931 pursuant to the provisions of Section 13 of the Bank and Corporation Franchise Tax Act and that said return showed a taxable net income for the calendar year 1930 of $730,357.81, and a tax due of $12,845.30; that at the time of filing said return your Petitioners paid to said Commissioner by a check payable to the State Treasurer the sum of $6,422.65, being one-half of the tax shown to be due by said return; that on or about September 15, 1931, your Petitioners paid to said Commissioner by a check payable to the State Treasurer the sum of $6,422.65, being the remaining one-half of the tax shown [fol. 32] to be due by said return.

VII

In said return, said sum of $2,526,148.22, representing income derived from the transportation of passengers and freight between ports of the Pacific Coast of the United States and ports in the Territory of Hawaii, the South Seas, Australia and New Zealand, as aforesaid was not included in net income of the Petitioners for the purpose of computing said tax; on or about March 5, 1932, said Commissioner mailed to your Petitioners a notice Number 15951, a true copy of which is hereto attached marked Exhibit "A", wherein and whereby said Commissioner proposed to assess upon your Petitioners an additional tax in the amount of $101,045.92; said proposed assessment was based upon the allocation to business done within this state of the entire net income of your Petitioners, including the said amount of $2,526,148.22, representing net income derived from the transportation of passengers and freight between ports on the Pacific Coast of the United States and ports in the Territory of Hawaii, the South Seas, Australia and New Zealand.

VIII

Within sixty days after the date of said notice your Petitioners filed with said Commissioner a written protest, under oath, against said proposed assessment of said additional tax; that on December 23, 1932, a hearing upon said [fol. 33] protest was had before said Commissioner; that on November 23, 1932, said Commissioner mailed to your Petitioners a notice of his final action upon said protest, a true copy of which said notice is hereto annexed marked Exhibit "B". That by said final action said Commissioner assessed upon your Petitioners an additional tax in the amount of $19,637.71. Said assessment was based upon the allocation to business done within this state of 22.2% of all net income derived by your Petitioners from transportation of passengers and freight between ports on the Pacific Coast of the United States and ports in the Territory of Hawaii, the South Seas, Australia and New Zealand.

IX

On December 23, 1932, your Petitioners filed with the State Board of Equalization an appeal from said final action of said Commissioner. That on February 15, 1934, said Board ordered that said action of said Commissioner be sustained.

X

The Commissioner and the Board in assessing said additional taxes have acted in violation of the terms of the said Bank and Corporation Franchise Tax Act and beyond the authority conferred thereby, in that said additional taxes are not measured by net income from business done within the State or by net income from business allocated to the State of California under the terms of said Act. The said order of the Commissioner and said order of the Board are [fol. 34] unlawful and void, in that therein and thereby the Commissioner and the Board have assessed a tax upon, and measured by, the interstate and foreign business of the Taxpayers and upon income therefrom and said Act does not authorize any tax upon or measured by said interstate and foreign business of the Taxpayers or the income therefrom.

XI

Said order of the Board and said assessment are unconstitutional and void, in that the said order and assessment are based upon a construction of said Bank and Corporation Franchise Tax Act that the Commissioner and the Board are thereby authorized to impose upon the Taxpayers a tax upon the privilege of doing interstate and foreign business and measured by the income therefrom, and that if so construed the said Act violates the provisions of Section 8 of Article I of the Constitution of the United States and is therefore unconstitutional and void.

XII

Said order and said assessment are unconstitutional and void, in that they deny the Petitioners the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment of the Constitution of the United States, and lack uniformity in their operation, in violation of Section 11 of Article I of the Constitution of California.

[fol. 35]

XIII

Said assessment and said order are unconstitutional and void, in that the said assessment and order deprive the Petitioners of their property without due process of law and without just or any compensation, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

XIV

Said assessment and said order are unconstitutional and void because the same are in violation of the provisions of Section 15 of Article XII of the Constitution of the State of California.

Wherefore, your Petitioners pray:

(1) That a writ of review issue out of this Court to said Board and said John C. Corbett, Fred E. Stewart, R. E. Collins, H. G. Cattell and Ray L. Riley, demanding them to certify fully to this Court at a specified place and time, not later than thirty (30) days after the date of the issuance of said writ, the records and proceedings in said cause that

the same may be inquired into and determined by this Court;

(2) That said matters and records be fully heard by this Court and that it be ordered, adjudged and decreed that said order made by said Board of Tax Appeals be annulled, vacated and set aside;

[fol. 36] (3) That pending said action by this Court, the Respondents be commanded and required to desist from further proceedings in said cause and to refrain from assessing or collecting the said additional assessment, or any portion thereof, and that all proceedings in connection therewith be stayed;

(4) That your Petitioners recover their costs herein and for such other and further relief as may be meet and just in the premises.

Respectfully submitted, Matson Navigation Company, by F. A. Bailey. The Oceanic Steamship Company, by F. A. Bailey. Matson Terminals, Inc., by F. A. Bailey, Petitioners. Brobeck, Phleger & Harrison, Attorneys for Petitioners.

[fol. 36a] *Duly sworn to by F. A. Bailey. Jurat omitted in printing.*

[fol. 37] EXHIBIT "A" TO PETITION

No. 15951

State of California

Office of Franchise Tax Commissioner

Sacramento

Notice of Additional Franchise Tax Proposed to Be Assessed

Date: March 5, 1932.

Matson Navigation Co.,
215 Market Street,
San Francisco, Calif. 32463.

Bank and Corporation Franchise Tax return for taxable year ended December 31, 1930, as transmitted by the above

corporation has been examined and the correct amount of the tax determined by the Commissioner, and it is proposed to assess an additional tax in the amount of $101,045.92. The details of the proposed additional assessment and of computing said tax are set forth below.

Amount of tax must be transmitted to the Franchise Tax Commissioner by certified check or money order payable to the State Treasurer. Interest must be added at six per cent per annum from the due date, March 15, 1931, to the date of payment.

Item	43	Net income both within and without the State from Schedule A	$3,256,506.03
	25	Interest federal, state and municipal bonds: Section 6 provides that gross income shall include gains, profits, and income	
[fol. 38]		derived from the business of whatever kind and nature	186,150.16
		Revised net income allocating 100% to Calif.	$3,442,656.19
Item	44	4%	137,706.24
	45	Offset	17,051.05
	46		120,655.19
	47	Add: 4% of offset	682.04
		Total tax assessed	121,337.23
		Less tax liability assessed:	
		Acknowledgment No. 17355 $12,845.30	
		Proposed assessment, No. 13255 7,446.01	20,291.31
		Additional tax	$101,045.92

This notice of additional franchise tax proposed to be assessed is forwarded to the taxpayer whose name appears hereon in accordance with the provisions of the Bank and Corporation Franchise Tax Act, Section 25 (see reverse side of this notice).

Interest as called for above must be included in remittance.

Chas. J. McColgan, Franchise Tax Commissioner,
by Richard P. Lowe.

GEZ.

[fol. 39] EXHIBIT "B" TO PETITION

State of California

Office of Franchise Tax Commissioner

Sacramento

Notice of Action of Franchise Tax Commissioner Upon Taxpayer's Protest

Dated at Sacramento, California, November 23, 1932.

Matson Navigation Co.
215 Market Street,
San Francisco, California. 32463.

You are hereby notified that pursuant to the terms of Section 25 of the Bank and Corporation Franchise Tax Act and the protest which you filed complaining of the computation and levy of your tax by the Franchise Tax Commissioner under said act as disclosed by return filed for the taxable year beginning January 1, 1930 and ended December 31, 1930, as set forth in Notice of Additional Franchise Tax Proposed to be Assessed, No. 15951, dated March 5, 1932, in the amount of $101,045.92.

The computation and levy complained of have been reconsidered by the Franchise Tax Commissioner and he has acted upon said protest as follows:

[fol. 40] In view of the evidence adduced at conference and hearings, liability is determined in accordance with the following computation:

Total tax assessed		$39,929.02
Less Acknowledgment No. 17,355	$12,845.30	
Proposed assessment No. 13,255	7,445.01	
		20,291.31
Revised additional tax		$19,637.71

Interest has accrued on the deficiency at the rate of 6% per annum from March 15, 1931.

Yours very truly, Chas. J. McColgan, Franchise Tax Commissioner; Chas. A. Temple, Auditor.

CAT:EB.

[fol. 41] IN SUPREME COURT OF CALIFORNIA

In Bank

[Title omitted]

ORDER GRANTING WRIT OF REVIEW—Filed April 23, 1934

By the COURT:

Let a writ of review issue in the above-entitled matter, returnable before this court in bank, at its courtroom in San Francisco, on Tuesday, July 17th, 1934, at ten o'clock A. M.

Dated: April 23, 1934.

Seawell, Acting Chief Justice.

[File endorsement omitted.]

[fol. 42] [File endorsement omitted]

IN SUPREME COURT OF CALIFORNIA

[Title omitted]

Record of State Board of Equalization—Filed July 13, 1934

[fol. 43] BEFORE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

SECRETARY'S CERTIFICATE

STATE OF CALIFORNIA,
County of Sacramento, ss:

I, Dixwell L. Pierce, do hereby certify that I am the duly appointed, qualified and acting Secretary of the State

Board of Equalization, and that the attached is a full, true and correct copy of the proceedings had before the State Board of Equalization in the matter of the appeal of the Matson Navigation Co., The Oceanic Steamship Company and Matson Terminals, Inc., from the action of the Franchise Tax Commissioner upon their protest to a proposed assessment of an additional tax of $19,637.71 under the Bank and Corporation Franchise Tax Act (Chap. 13, Stats. of 1929 as amended) for the year 1931 based upon their returns for the calendar year ended December 31, 1930.

In witness whereof, I have hereunto affixed my signature and the seal of said Board, at Sacramento, California, this 18th day of May, 1934.

Dixwell L. Pierce, Secretary, State Board of Equalization. (Seal.)

[fol. 44] Received December 23, 1932. State Board of Equalization

BEFORE STATE BOARD OF EQUALIZATION

In the Matter of the Appeal of MATSON NAVIGATION COMPANY, THE OCEANIC STEAMSHIP COMPANY, and MATSON TERMINALS, INC., from Action of the Franchise Tax Commissioner upon Protest Against Determination of Franchise Taxes for Taxable Year 1930

APPEAL

To the State Board of Equalization:

Matson Navigation Company, The Oceanic Steamship Company and Matson Terminals, Inc., corporations duly organized and existing under and pursuant to the laws of the State of California, hereby appeal from the action of the Franchise Tax Commissioner upon the protests of appellants against the determination by such Commissioner of franchise taxes of appellants for the taxable year 1930, and in support thereof allege:

I

On or about March 16, 1931, appellants filed with the State Franchise Tax Commissioner a consolidated fran-

[fol. 45] chise tax return pursuant to the provisions of Section 13 of the Bank and Corporation Franchise Tax Act, a true copy of which said return is hereto annexed, marked Exhibit "A".

II

Attached hereto and marked Exhibit "B" is a true copy of an assessment notice of said Franchise Tax Commissioner numbered 15951, dated March 5, 1932, wherein and whereby an additional tax was assessed upon appellants of $101,045.92. Within sixty days after the date of said assessment appellants filed a written protest under oath against the levy of said proposed additional tax. On November 23, 1932, said Franchise Tax Commissioner mailed to appellants notice of his action upon said protest, which said notice is in the form attached hereto, marked Exhibit "C", and by said final action said Franchise Tax Commissioner assessed additional taxes upon appellants in the sum of $19,637.71.

III

Said assessment of $19,637.71 was and is invalid, illegal and erroneous, unfair and without any foundation whatever, and in violation of Section 10 of said Act.

[fol. 46] IV

Appellants further object and protest against the said assessment upon the ground that same is not determined or measured by that portion or any portion of the net income of appellants which is done within the State of California, and the further ground that the said assessment is based upon an allocation to appellants' net income from business done by appellants within the State of California, which allocation is not upon the basis of sales, purchases, expenses of manufacture, particular value and situs of tangible property or by reference to any of said factors or by any method of allocation which is fairly calculated to assign to the State of California a portion of the net income of appellants reasonably attributable to business done within said State of California and/or to avoid subjecting the taxpayers to double taxation.

V

Appellants further object and protest against said assessment upon the ground that said notice of additional franchise tax proposed to be assessed, No. 15951 is null and void for the reason that it does not set forth the details of the proposed additional assessment.

VI

Appellants further object and protest against said as- [fol. 47] sessment upon the ground that the same is unconstitutional and void under the provisions of the Constitution of the United States.

VII

Appellants further object and protest against said assessment upon the ground that the same is unconstitutional and void under the provisions of the Constitution of the State of California.

VIII

Appellants further object and protest against said assessment upon the ground that the same is unconstitutional and void under the provisions of Section 8 of Article I of the Constitution of the United States.

IX

Appellants further object and protest against said assessment upon the ground that the same is unconstitutional and void under the provisions of Section 15 of Article XII of the Constitution of the State of California.

Wherefore, appellants appeal from the action of said Franchise Tax Commissioner upon said protest and for a determination of the franchise tax for the calendar year 1930, and that said additional assessment be declared [fol. 48] void.

Matson Navigation Company, The Oceanic Steamship Company, Matson Terminals, Inc., Appellants, by Brobeck, Phleger & Harrison, Their Attorneys.

(Here follows photolithographs, side folios 49 and 50.)

FORM 108

BANK AND CORPORATION FRANCHISE TAX RETURN

This return must be filed with the STATE FRANCHISE TAX COMMISSIONER, SACRAMENTO, CALIFORNIA, within two months and fifteen days after the close of the taxable year

Certified check or money order payable to State Treasurer for one-half of the tax must accompany this return

EXHIBIT "A"

MATSON NAVIGATION COMPANY
215 MARKET STREET
SAN FRANCISCO, CALIFORNIA

(Exact Corporate Title)

(Mail Address)

To Be Filled in by Taxpayer

Total tax per Item 48 or 50 (minimum tax $25) $	
Amount remitted herewith $	

(LEAVE THESE SPACES BLANK)

R	A
OB	RA
CV	
PE	

(1) Date of incorporation Feb. 9, 1901
(2) Under laws of California
(3) Kind of business Transportation - Water
(4) Began business in California February 1901
(5) Is this a consolidated return? Yes
(6) If the income of this corporation is included on the return of another corporation, give name of such corporation

Copy Statement of Net Income from Corporation Federal Income Tax Return for the calendar year 1930 or the fiscal year commencing ..... and ending .....

(THE FOLLOWING MUST BE COPIED FROM LINES 1 TO 24, INCLUSIVE, OF THE RETURN FILED WITH THE FEDERAL GOVERNMENT COVERING THE ABOVE FISCAL PERIOD AND SHOULD BE SUPPORTED BY COPIES OF SCHEDULES WHICH ACCOMPANIED THAT RETURN)

SCHEDULE A

Item No.	GROSS INCOME		
1.	Gross Sales from Trading or Manufacturing, Less Returns and Allowances		$
2.	Less Cost of Goods Sold:		
	(a) Inventory at close of preceding year	$	
	(b) Merchandise bought for sale		
	(c) Cost of manufacturing or otherwise producing goods (Submit copy of Schedule A, Federal return)		
	(d) Total lines (a), (b), and (c)	$	
	(e) Less inventory at end of year		
3.	Gross Profit from Trading or Manufacturing (Item 1 minus Item 2)		$
4.	Gross Profit from Operations Other Than Trading or Manufacturing. (State source of income)		
	(a)		
	(b) SCHEDULES ATTACHED		
	(c)		
5.	Interest on Bank Deposit, Notes, Mortgages, and Corporation Bonds		
6.	Rents		
7.	Royalties		
8.	Profit from Sale of Real Estate, Stocks, Bonds, and other Capital Assets (Submit Schedule)		
9.	Dividends on Stock of Domestic Corporations		
10.	Other Income (including dividends received on stock of foreign corporations).		
	(a)		
	(b)		
	(c)		
11.	TOTAL INCOME IN ITEMS 3 TO 10		$
	DEDUCTIONS		
12.	Compensation of Officers (Submit Schedule)		$
13.	Rent on Business Property		
14.	Repairs		
15.	Interest		
16.	Taxes (Submit Schedule)		
17.	Losses (Submit Schedule)		
18.	Bad Debts (Submit Schedule)		
19.	Dividends (Submit Schedule)		
20.	Depreciation (resulting from exhaustion, wear and tear, or obsolescence) (Submit Schedule)		
21.	Depletion of Mines, Oil and Gas Wells, Timber, etc. (Submit Schedule)		
22.	Other Deductions Not Reported Above. (Explain below, or on separate sheet):		
	(a) Salaries and wages. (Not included in Items 2, 12, or 14 above)		
	(b) Net loss for prior year		
	(c)		
	(d)		
	(e)		
	(f)		
23.	TOTAL DEDUCTIONS IN ITEMS 12 TO 22		
24.	NET INCOME (Item 11 minus Item 23)		$ 49

18A

Net income, Item 24, corporation federal income tax return brought forward ____ $

ADJUSTMENTS

(To conform to California statute)

ADD

Interest on U. S. Government Securities $186,150.16 not Included

25. Interest received from Federal, State, Municipal and Other Bonds, not included in Item 7, above ____ $

26. California state franchise tax paid under Const. Art. XIII, Sec. 14 (*d*) ____

27. California state franchise tax paid under Const. Art. XIII, Sec. 16 (Bank and Corporation Franchise Tax Act) ____

28. Foreign and domestic income and profits taxes paid, included in Item 16, above ____

29. Net loss for prior year, Item 22 (*b*) above ____ SCHEDULE ATTACHED

30. Excess of proceeds of life insurance over premiums paid (Sec. 9 (*c*)) (Submit Schedule) ____

31. Deductions disallowed and/or income added by Bureau of Internal Revenue, U. S. Treasury Department, if any, for the calendar year ended ____ (Insert date) (If more than one year submit detail) ____

32. Other additions not reported above:

(*a*) ____

(*b*) ____

(*c*) ____

33. TOTAL OF ITEMS 24 to 32, inclusive ____ $

DEDUCT

34. Federal income taxes accrued during the period covered by this return ____ $

35. Additional income tax assessed by Bureau of Internal Revenue, U. S. Treasury Department, if any, for the calendar or fiscal year ended ____ (Insert date) (If more than one year submit detail)

36. Additional depreciation based on January 1, 1928, value (Submit detailed Schedule) ____

37. Additional depletion based on January 1, 1928, value (Submit detailed Schedule) ____ SCHEDULE ATTACHED

38. Other deductions not reported above:

(*a*) ____

(*b*) ____

39. TOTAL DEDUCTIONS (Items 34 to 39, inclusive) ____ $

40. Net income for State purposes—exclusive of dividends added at Item 42 (Deduct Item 39 from Item 33) ____ $

41. Net income, exclusive of dividends received, allocated to State, from Schedule C, line (*d*) ____ % of $ ____ (To be used only by banks and corporations whose entire business is not done within the State)

42. Dividends received from income arising out of business done without this State. (Submit Schedule) (See Instructions)

43. NET INCOME FOR STATE PURPOSES (Item 40 plus 42, or 41 plus 42 as appropriate) SCHEDULE C ATTACHED ____ $ 730,357.81

SCHEDULE B—COMPUTATION OF TAX

44. Tax—4% of Item 43 ____ 29,214.31

45. OFFSET ALLOWANCE (See Instructions)

(*a*) 10% of real estate taxes paid in California ____ $ 4,771.80

(*b*) 100% of personal property taxes paid in California ____ $ 12,279.25

(*c*) Total of tax (*a*) and (*b*) ____ 17,051.05

(*d*) Offset allowable—that portion of (*c*) not in excess of 75% of Tax, Item 44 ____ $ 17,051.05

46. (*e*) Tax after offset allowance ____ $ 12,163.26

47. (*f*) Add: 4% of (*d*) (See Instructions) ____ 682.04

48. (*g*) Total tax (minimum tax $25) ____ $ 12,845.30

One-half of total tax payable with this return. Balance of tax due and payable on or before the 15th day of the ninth month following close of the taxable year.

49. (*b*) Second year liability (Applicable only to new corporations filing first return) (See Instructions) ____ $

50. (*i*) Total —48 and 49 ____ $ 12,845.30

[fol. 51] Consolidated Return

Parent Company: Matson Navigation Company, 215 Market Street, San Francisco

Subsidiaries: The Oceanic Steamship Company, Matson Terminals, Inc., 215 Market Street, San Francisco

[fol. 52] Allocation and Adjustment Schedules

Schedules A & C—Net income, adjustments, eliminations, and allocation of net income.

Item 14a—Allocation of repairs.
Item 16a— " of taxes.
Item 20a— " of depreciation.
Item 26a—Dividends from income out of business done without the State.
Item 27 —Corporation franchise taxes.
Item 38a—Other deductions.
Item 47 —Analysis of taxes used as offset allowance. Analysis of eliminations.

(Here follows table, side folio 53.)

[fol. 53]

Matson Navigation Company

Schedule A

Net Income

Adjustments

Schedule C—Allocation of Income

Gross Income	Matson Navigation Company	The Oceanic Steamship Company	Matson Terminals, Inc.	Elimin. See Analysis	Consolidated	Adjustments Item No.	Adjustments Amount	Total	Total Without State	Net income for State Purposes
4. Gross Profit from Operations:										
(a) Net Vessels Earnings	$4,596,121.84	1,074,767.57		26,045.22	5,696,934.63			5,696,934.63	5,696,934.63	
(b) Stevedoring & Car Unload.			511,479.07		511,479.07			511,479.07	438,520.44	72,958.63
5. Interest	311,050.23	30,400.99	219.54		341,670.76			341,670.76		341,670.76
9. Dividends	753,807.20			(280,000.00a)	473,807.20	(26)	(313,250.00)	160,557.20		160,557.20
10. Other Income	630,108.77	57,136.83	2,366.34	(132,308.47)	557,303.47			557,303.47		557,303.47
11. Total Income	6,291,088.04	1,162,305.39	514,064.95	(386,263.25)	7,581,195.13		(313,250.00)	7,267,945.13	6,135,455.07	1,132,490.06
Deductions										
12. Compensation of Officers	119,646.25				119,646.25			119,646.25	101,002.97	B18,643.28
14. Repairs	319,485.64	54,310.07	33,295.50		407,091.21			407,091.21	404,822.67	2,268.54
16. Taxes	23,393.17	8,919.95	2,591.61	46,735.24	81,639.97	(27)	(16,696.85)	64,943.12	10,636.15	54,306.97
17. Losses	293,949.45	34,426.90			328,376.35			328,376.35	328,376.35	
18. Bad Debts	6,831.16				6,831.16			6,831.16	6,831.16	
19. Dividends	(753,807.20)			(280,000.00a)	473,807.20	(26)	(473,807.20)			
20. Depreciation	1,107,667.30	178,608.97	38,088.14		1,324,364.41			1,324,364.41	1,271,624.27	52,740.14
22. Other Deductions:										
(c) Ordin. & Neces. Expenses	1,158,958.29	176,941.06	140,846.60	(152,998.49)	1,323,747.46	(38a)	13,997.50	1,337,744.96	1,129,297.57	B208,447.39
(d) Loss on Sale of Autos			634.90		634.90			634.90	634.90	
Federal Taxes						(36)	421,806.74	421,806.74	356,080.81	B65,725.93
23. Total Deductions	3,783,738.46	453,206.95	215,456.75	(386,263.25)	4,066,138.91		(54,699.81)	4,011,439.10	3,609,306.85	402,132.25
24. Net Income	2,507,349.58	(709,098.44	298,608.20		3,515,056.22		(258,550.19)	3,256,506.03	2,526,148.22	730,357.81

(a) Inter-Company Dividend.

B Allocated on basis of percentage of Income Within and Without the State:

Income Without State	$6,135,455.07	84.418%
Income Within State	1,132,490.06	15.582%
Total	7,267,945.13	

Note.—Items within ( ) should be red ink.

[fol. 54] Matson Navigation Company
Item 14a
Allocation of Repairs

	Total	Total without State	Deduction for State purposes
Matson Navigation Co.	$319,485.64	319,485.64	
The Oceanic Steamship Co.	54,310.07	54,310.07	
Matson Terminals, Inc.:			
San Francisco	15,903.67	13,635.13	2,268.54*
Honolulu	10,212.94	10,212.94	
Hilo	3,921.01	3,921.01	
Seattle	3,242.68	3,242.68	
Kukuihaele	15.20	15.20	
Total Matson Terminals, Inc.	33,295.50	31,026.96	2,268.54
Total	407,091.21	404,822.67	2,268.54

*Total Revenue from Stevedoring and Car Labor $511,479.07
Revenue from Business done Within the State 72,958.63

Percentage used as Basis for Allocation 14.262.24

[fol. 55] Matson Navigation Company
Item 16a
Taxes

Matson Navigation Co.	Taxes accrued	California taxes paid	Deferred to year 1931	Taxes expense
California:				
San Francisco	$80,748.91			
Crockett	1,055.11			
Los Angeles	29.12			
Licenses	177.50			
Stamp Taxes	507.73			
	82,518.37	58,273.49	29,364.97	53,153.40
Outside State	726.38			726.38
Franchise Tax	16,248.63			16,248.63
Total Matson Nav. Co.	99,493.38		29,364.97	70,128.41
The Oceanic Steamship Co.				
California	917.23	917.23	458.65	458.58
Stamp Taxes	291.75			291.75
	1,208.98			750.33
Outside State	10,763.88		2,619.26	8,144.62
Franchise Tax	25.00			25.00
Total Oceanic	11,997.86		3,077.91	8,919.95
Matson Terminals, Inc.				
California	806.48	806.48	403.24	403.24
Franchise Tax	423.22			423.22
Outside State	1,765.15			1,765.15
Total Matson Terminals	2,994.85		403.24	2,591.61
Total	114,486.09	59,997.20	32,846.12	81,639.97
Deduct Franchise Taxes.				16,696.85
				64,943.12
In State			54,306.97	
Outside State			10,636.15	

[fol. 56] Matson Navigation Company

Item 26

Dividends from Income Out of Business Done Without This State

American Factors, Ltd.			$55,200.00
Inter-Island Steam Navigation Co.			69,000.00
Theo. H. Davies & Co., Ltd.			28,430.00
Paauhau Sugar Plantation Co.			6,500.00
Merritt, Chapman & Scott			1,427.20
Total			160,557.20
Total Dividends Item 19		753,807.20	
Less:			
Intercompany	280,000.00		
Item 26 above	160,557.20		
		440,557.20	
Adjustment Schedule C (26)		313,250.00	

Item 27

Corporation Franchise Tax

Matson Navigation Company	$16,248.63
Matson Terminals, Inc.	423.22
The Oceanic Steamship Co.	25.00
Total	16,696.85

Item 38a

Other Deductions

Contributions	$13,997.50

[fol. 57] Matson Navigation Company

Item 47

Analysis of Taxes Used As Offset Allowance

	Total tax paid	Real estate	Personal property
Matson Navigation Company:			
San Francisco County:			
Tax Bill #1520 (1920–31 Roll)	$20,809.03	20,809.03	
#1530 (1929–30 Roll)	18,822.56	18,822.56	
#1155 (1929–30 Roll)	2,682.56	2,682.56	
#1126 (1930–31 Roll)	2,750.63	2,750.63	
#1531 (1929–30 Roll)	864.83	864.83	
#1532 (1929–30 Roll)	733.23	733.23	
Launch "Barnacle":			
Receipt #22,927	7.88		7.88
Other Personal Property:			
Receipt #71,462	10,518.54		10,518.54
Contra Costa County:			
Tax Bill #51,318	1,055.11	1,055.11	
Los Angeles:			
Tax Bill #155,204	29.12		29.12
The Oceanic Steamship Co.:			
San Francisco County:			
Receipt #72,878	917.23		917.23
Matson Terminals, Inc.:			
San Francisco County:			
Receipt #74,544	806.48		806.48
Total	59,997.20	47,717.95	12,279.25

[fol. 58] Matson Navigation Company

Schedules

Schedule D—Balance Sheet.
E—Reconciliation of net income and analysis of changes in surplus.

Item 10 a—Other Income.
12 —Compensation of Officers.
14 —Repairs.
16 —Taxes.
17 —Losses.
18 —Bad Debts.
19 —Dividends.
20 —Depreciation.

[fol. 59] Matson Navigation Company
Schedule D
Balance Sheets

Assets	Jan. 1, 1930	Dec. 31, 1930
Cash	$5,919,444.46	6,139,107.23
Accounts & Notes Receivable	1,059,630.63	1,958,363.56
United States Government Bonds	3,980,411.25	3,485,163.88
Corporation Bonds	502,500.00	1,002,500.00
Stocks of Other Companies	6,823,788.57	7,893,588.57
Stores	155,443.27	155,631.41
Deferred Accounts	197,586.27	603,801.47
Real Estate	497,000.20	497,000.20
Depreciable Assets	16,684,574.43	15,130,617.19
Total Assets	35,820,379.08	36,865,773.51
Liabilities		
Indebtedness	1,163,346.12	575,410.76
Federal Taxes Accrued	366,990.06	301,000.00
Deferred Credits	.....	494,359.44
Reserve for Marine Insurance	1,269,691.16	1,390,565.66
Protection & Indemnity Ins. Reserve	132,715.47	97,202.83
Reserve for Major Repairs	277,644.92	610,621.79
Reserve for Cargo Loss & Damage	28,433.58	44,584.66
Pension Fund Reserve	50,000.00	73,195.00
Capital Stock	24,451,800.00	24,452,100.00
Stock Scrip Certificates	566.68	266.67
Paid in Surplus, Stock Premiums	62,500.00	62,500.00
Appreciation Surplus	3,044,532.15	3,058,884.51
Earned Surplus	4,972,158.94	5,705,082.19
Total Liabilities	35,820,379.08	36,865,773.51
Analysis of Depreciable Assets		
Net Value, Item 20	14,190,042.28	13,141,464.59
Accounted Appreciation (Net)	3,044,532.15	3,058,884.51
	17,234,574.43	16,200,349.10
Less Reserve for Obsolescense—Vessels Cost	550,000.00	1,069,731.91
Depreciable Assets, Above	16,684,574.43	15,130,617.19

[fol. 60] Matson Navigation Company

Schedule E

Reconciliation of Net Income and Analysis of Changes in Surplus

1.	Net Income from Item 24		$2,507,349.58
2.	Non-Taxable Income:		
	(c) Interest on United States obligations		186,150.16
	(j) Dividends Deductible		753,807.20
4.	Charges against Reserve for Contingencies:		
	(a) Major Repairs		319,485.64
	(b) Marine Insurance		106,177.64
	(c) Protection & Indemnity Insurance		139,277.89
	(d) Cargo Loss & Damage		48,493.92
	(e) Pension Fund		26,805.00
	Total of lines 1 to 4 inclusive		4,087,547.03
	Deduct:		
13.	(a) Contributions	13,997.50	
	(j) Additions to Reserves for Contingencies		
	(1) Major Repairs	652,462.51	
	(2) Marine Insurance	227,052.14	
	(3) Obsolescence on Vessels Cost	112,891.91	
	(4) Depreciation and Obsolescence on Appreciation	242,487.64	
	(5) Protection & Indemnity Ins.	103,765.25	
	(6) Cargo Loss and Damage	64,645.00	
	(7) Pension Fund	50,000.00	
	(8) Special Depreciation	150,000.00	
		1,617,301.95	
	Less Reserve Additions applicable to Incomplete Voyage, Item 4a	45,150.53	
		1,572,151.42	
	(k) Other Unallowable Deductions		
	(1) Federal Taxes Acct. (Estimate)	301,000.00	1,873,151.42
7.	Net Profit for Year, as Shown by Books		2,214,395.61
8.	Surplus as Shown by Balance Sheet, Dec. 31, 1929		4,972,158.94
9.	Other Credits to Surplus:		
	(a) Appreciation Realized through Operation		242,487.64
10.	Total of Lines 7 to 9 Inclusive		7,429,042.19
15.	Dividends Paid in Cash	1,467,120.00	
16.	Other Debits to Surplus:		
	(a) Obsolescence on Vessels Cost, Years 1928 & 1929, transferred to Reserve for Obsolescence Vessels Cost	256,840.00	1,723,960.00
12.	Surplus at Close of Taxable Year as Shown by Balance Sheet		5,705,082.19

[fol. 61] Matson Navigation Company

Item 10a

Other Income

Commissions	$261,225.58
Trade Discounts	42,204.22
Cafeteria	43,290.12
Miscellaneous	16,858.37
Car Loading	791.33
Matson Net Building	185,300.56
Main Street Building	5,457.04
Tug "Danty" Charter Hire	4,422.50
Discount	22,562.35
Damage Judgment "Mauna Ala"	14,479.43
"Polynesian" publication	13,910.60
Miscellaneous	10,758.28
Insurance Commission Fund	8,848.39
Total	630,108.77

Item 12

Compensation of Officers

W. P. Roth, President	50,000.00
E. D. Tenney, Chairman of the Board	25,000.00
A. C. Dericx, Vice-President	20,000.00
F. A. Bailey, Vice-President	15,000.00
R. P. Hasenauer, Treasurer	6,746.25
A. M. McCarty, Ex-treasurer	2,900.00
Total	119,646.25

[fol. 62] Matson Navigation Company

Item 14—Repairs

S. S. "Malolo"	$127,883.00
"Maui"	7,811.80
"Matsonia"	20,383.11
"Wilhelmina"	13,613.91
"Manoa"	14,464.10
"Manukai"	3,158.96
"Manulani"	19,832.61
"Maunalei"	7,659.66
"Mahukona"	272.67
"Mauna Ala"	14,718.51
"Makiki"	15,679.71
"Maliko"	11,603.82
"Makawao"	11,249.85
"Makua"	10,410.77
"Mala"	8,720.28
"Malama"	6,254.45
"Mana"	5,031.57
"Manini"	8,025.26
"Maunawili"	12,711.60
	319,485.64

Item 16—Taxes

San Francisco Property Taxes		$80,748.91
Corporation Franchise Tax		16,248.63
Crockett Taxes		1,055.11
Hawaiian Islands Taxes		665.21
Stamp Taxes		507.73
Chicago Taxes		34.77
Los Angeles Taxes		29.12
New York "		26.40
Licenses		177.50
		99,493.38
Deduct:		
Taxes included in Departmental Operating Expense	46,735.24	
Deferred to Year 1931	29,364.97	
		76,100.21
Total		23,393.17

[fol. 63] Matson Navigation Company

Item 17—Losses

Marine:

S. S. "Malolo"	$27,030.60
"Maui"	10,619.19
"Matsonia"	4,706.63
"Wilhelmina"	2,683.62
"Manoa"	2,523.79
"Manukai"	5,524.83
"Manulani"	4,961.84
"Maunalei"	1,895.31
"Maunawili"	8,609.51
"Mauna Ala"	16,441.15
"Makiki"	1,275.41
"Maliko"	1,430.96
"Makawao"	7,074.17
"Makua"	781.34
"Mala"	5,045.23
"Malama"	1,029.12
"Mana"	1,176.46

Item 17—Losses—Continued

"Manini"	2,667.53
"Enterprise"	92.80
"Mahukona"	93.75
"Makaweli"	93.35
"Makena"	421.05
Total Marine	106,177.64
Protection & Indemnity Losses & Expense	139,277.89
Claims Paid, Less Salvage	48,493.92
Total	293,949.45

[fol. 64] Matson Navigation Company

Item 18—Bad Debts

Note Receivable, Capt. Ozanne	$6,149.11
Traffic Accounts	362.05
Disputed Passage Authorizations	320.00
Total	6,831.16

Item 19—Dividends Deductible

Matson Terminals, Inc.	280,000.00
Honolulu Oil Corporation, Ltd.	239,000.00
Marine Repairs, Ltd.	74,250.00
Inter-Island Steam Nav. Co.	69,000.00
American Factors Co. Ltd.	55,200.00
Theo. H. Dayies & Co. Ltd.	28,430.00
Paauhau Sugar Plantation Co.	6,500.00
Merritt, Chapman & Scott	1,427.20
Total	753,807.20

[fol. 65]

Matson Navigation Company

Item 20

Depreciation

	Cost Dec. 31, 1929	Cost Dec. 31, 1930	Depreciation Reserve			Net value
			Balance Jan. 1, 1930	1930 depreciation	Balance Dec. 31, 1930	
S. S. "Mololo"	$6,041'804.76	6,046,707.45	622,870.76	302,090.24	924,961.00	5,121,746.45
"Maui"	1,859,187.01	1,859,473.14	1,135,359.70	92,959.35	1,228,319.05	631,154.09
"Matsonia"	1,505,034.31	1,505,034.31	1,119,908.45	75,251.72	1,195,160.17	309,874.14
"Wilhelmina"	905,959.96	905,959.96	893,854.16	12,105.80	905,959.96	.....
"Manoa"	859,203.43	859,203.43	658,113.23	42,960.17	701,073.40	158,130.03
"Manukai"	2,489,516.35	2,489,516.35	1,055,685.01	124,475.82	1,180,160.83	1,309,355.52
"Manulani"	2,459,779.82	2,459,779.82	1,066,593.75	122,988.99	1,189,582.74	1,270,197.08
"Mannalei"	384,211.80	384,211.80	89,661.40	24,382.97	114,044.37	270,167.43
"Mannawili"	360,635.61	360,635.61	86,559.76	22,677.56	109,237.32	251,398.29
"Mauna Ala"	410,236.08	410,236.08	156,412.00	28,199.23	184,611.23	225,624.85
"Makiki"	367,057.63	367,057.63	131,189.82	29,483.48	160,673.30	206,384.33
"Maliko"	383,238.60	383,238.60	87,163.32	32,325.04	119,488.36	263,750.24
"Makawao"	76,602.26	80,800.67	6,601.08	5,469.40	12,070.48	68,730.19
"Makua"	75,940.42	77,140.42	6,443.49	5,839.82	12,283.31	64,857.11
"Mala"	109,729.91	114,470.33	17,525.84	8,278.88	25,804.72	88,665.61
"Malama"	88,090.32	88,415.32	14,683.85	7,257.19	21,941.04	66,474.28
"Mana"	59,401.50	61,901.50	11,906.53	4,223.45	16,129.98	45,771.52
"Manini"	83,877.31	85,306.64	8,399.81	6,450.17	14,849.98	70,456.66
"Enterprise"	299,548.55	299,548.55	270,453.42	29,095.13	299,548.55	.....
"Mahukona"	152,068.15	152,068.15	60,422.06	9,160.21	69,582.27	82,485.88
"Makaweli"	155,763.01	155,763.01	61,892.63	9,382.53	71,275.16	84,487.85
"Makena"	167,131.17	167,131.17	66,356.03	10,072.68	76,428.71	90,702.46
Total Vessels	19,294,017.96	19,313,599.94	7,628,056.10	1,005,129.83	8,633,185.93	10,680,414.01

Matson Building:						
Bldg. Structure	2,155,077.82	2,155,077.82	252,016.67	43,101.56	295,117.63	1,859,960.19
Equipment	1,616.12	1,616.12	853.48	161.61	1,015.09	601.03
Fort Accessories Bldg.:						
Bldg. Structure	254,083.41	254,083.41	10,127.10	5,081.67	15,208.77	238,874.64
Equipment	29,630.52	29,630.52	5,926.10	2,963.05	8,889.15	20,741.37
Machinery	18,717.66	18,717.66	3,726.77	1,871.77	5,598.54	13,119.12
Meat Department	42,437.52	42,829.00	8,310.09	4,243.75	12,553.84	30,275.16
Upholstery Dept.	326.16	503.85	11.26	32.62	43.88	459.97
Sanitary Dept.	334.62	334.62	33.46	33.46	66.92	267.70
Stores Equipment	12,543.77	12,543.77	2,619.92	1,254.38	3,874.30	8,669.47
Laundry	81,737.60	81,737.60	26,073.98	6,130.32	32,204.30	49,533.30
Main Street Bldg.	60,000.00	60,000.00	.....	3,000.00	3,000.00	57,000.00
Cafeteria	16,730.83	16,730.83	12,544.19	1,673.08	14,217.27	2,513.56
Automobiles	18,669.39	16,320.90	.....	4,066.60	4,066.60	12,254.30
Launch "Barnacle"	4,300.00	4,300.00	4,300.00	.....	4,300.00	.....
Launch "Mahalo"	.....	2,289.32	.....	.....	.....	2,289.32
Launch "Catalina"	292.03	271.06	.....	29.20	29.20	241.86
Wharf Machinery & Equip.	10,133.62	11,755.12	2,590.33	2,026.72	4,617.05	7,138.07
Wharf Eqpt. on Leased Grd.	52,392.96	71,310.83	40,398.27	5,239.30	45,637.57	25,673.26
Wharf Furniture & Fixtures	4,492.58	5,580.32	1,283.93	449.26	1,733.19	3,847.13
Furniture & Fixtures Misc.	92,439.88	108,687.94	(11,111.53)*	9,113.70	67,071.29	41,616.65
			46,846.06			
Tug "Danty"	30,000.00	30,000.00	4,467.21	3,000.00	7,467.21	22,532.79
Crockett Equipment	72,870.78	72,870.78	44,374.22	3,643.54	48,017.76	24,853.02
Seattle Equipment	532.80	532.80	.....	106.56	106.56	426.24
Honolulu Wharf Eqpt.	3,551.81	4,592.53	1,250.72	710.36	1,961.08	2,631.45
Honolulu Pipe Line	3,953.57	4,974.82	2,468.69	197.68	2,666.37	2,308.45
Honolulu Automobiles	.....	2,817.80	.....	161.00	161.00	2,656.80
Honolulu Furn. & Fixtures	.....	116.64	.....	.....	.....	116.64
Hilo Wharf Equipment	1,522.09	1,786.80	910.26	304.42	1,214.68	572.12
Ahukini Wharf Equipment	2,200.00	2,200.00	2,200.00	.....	2,200.00	.....
Kahului Wharf Equipment	897.69	897.69	201.22	44.88	246.10	651.59
Kaanapali Wharf Equipment	2,888.04	2,888.04	1,554.44	144.40	1,698.84	1,189.20
Honokaa Wharf Equipment	3,743.50	7,524.34	.....	938.70	938.70	6,585.64
Honuapo Wharf Equipment	950.00**	.....	.....	.....	.....	.....
Los Angeles Fur. & Fixt.	16,952.50	17,318.30	1,769.17	1,695.25	3,464.42	13,853.88

Matson Navigation Company—Continued

Item 20

Depreciation

	Cost Dec. 31, 1929	Cost Dec. 31, 1930	Depreciation Reserve: Balance Jan. 1, 1930	Depreciation Reserve: 1930 depreciation	Depreciation Reserve: Balance Dec. 31, 1930	Net value
Los Angeles Automobiles	.....	1,456.30	.....	336.69	336.69	1,119.61
Chicago Fur. & Fixtures	3,103.75	3,163.75	328.81	309.18	637.99	2,525.76
Chicago Automobiles	.....	605.75	.....	113.58	113.58	492.17
New York Fur. & Fixtures	2,450.04	3,516.22	306.89	245.00	551.89	2,964.33
New York Automobiles	.....	608.97	.....	114.18	114.18	494.79
	22,295,591.02	22,365,792.16	8,105,548.74 (11,111.53)*	1,107,667.30	9,224,327.57	13,141,464.59

[fol. 66] Matson Navigation Company

Item 20—Depreciation (Continued)

* 1906–1919 Eliminations Added Back (in 1930)		$17,345.40
Eliminated Year 1927	6,800.42	
Eliminated Year 1928	4,362.76	
Eliminated Year 1930	6,182.22	
Less Depreciation on 1918–1929 Additions included in Balances at Jan. 1, 1930		6,182.22
		11,163.18
Depreciation on Typewriter Sold		51.65
		11,111.53

** Transferred to Honokaa Equipment.

[fol. 67] Matson Navigation Company

Item 20a

Allocation of Depreciation

	Total	Without state	Deductions for state purposes
Matson Navigation Company:			
Vessels	$1,005,129.83	1,005,129.83	
Matson Bldg., Structure	43,101.56	.....	43,101.56
Matson Bldg., Equipment	161.61	.....	161.61
Port Accessories Bldg. Structure	5,081.67	5,081.67	.....
Service Dept. Equipment	16,529.35	16,529.35	.....
Main Street Building	3,000.00	.....	3,000.00
Tug "Danty"	3,000.00	.....	3,000.00
Miscellaneous Equipment	31,663.28	31,663.28	.....
Total	1,107,667.30	1,058,404.13	49,263.17
The Oceanic Steamship Co.:			
Vessels	176,000.01	176,000.01	
Equipment	2,608.96	2,608.96	
Total	178,608.97	178,608.97	
Matson Terminals, Inc.:			
California Properties:			
San Francisco Wharf Eqpt	26,504.43		
Crockett Equipment	650.71		
Western Refinery	54.86		
Total	27,210.00	23,733.03	3,476.97*
Hawaiian Wharf	6,863.61	6,863.61	
Seattle Equipment	4,014.53	4,014.53	
Total	38,088.14	34,611.17	3,476.97
Total Depreciation	1,324,364.41	1,271,624.27	52,740.14

An amount of $2,834.56, being 1/3 of 1928 repairs disallowed by Revenue Agent and included in Item 20 is not included in computing amount of depreciation used as deduction for state purposes.

*Total Revenue from Stevedoring and Car Labor		$511,479.07
Revenue from Business done Within the State		72,958.63
Percentage used as Basis for Deduction for State Purposes		14.26424
Matson Terminals Inc. Deprec'n. as above on California Properties	27,210.00	
Less 1/3 of 1928 Repairs disallowed	2,834.56	
14.26424% of	24,375.44	3,476.97

Matson Navigation Company

Analysis of Eliminations per Schedule A, Column 4

	Vessels Net Earnings	Miscellaneous Income	Ordinary & Necessary Expenses	Taxes
Matson Navigation Company:				
Other Income:				
Cafeteria Net Revenue Charged Vessels for Crew Board	$34,268.63*	(34,268.63)		
Insurance Commission Refund	8,848.39	(8,848.39)		
Trade Discount Vessels	42,204.22	(42,204.22)		
"Polynesian" Publication-Vessels	13,910.60	(13,910.60)		
Damages "Mauna Ala"	14,479.43	(14,479.43)		
Taxes included in Operating Exp.	.....	.....	(46,735.24)	46,735.24
Ordinary & Necessary Expenses:				
Service Dept. Expense	(5,312.17)	.....	(5,312.17)	
Seamen's Bonus	(53,382.30)	.....	(53,382.30)	
Purchasing Dept. Expenses	(23,310.25)	.....	(23,310.25)	
Stand by & Vacation Wages	(10,510.09)	.....	(10,510.09)	
The Oceanic Steamship Co.:				
Seamen's Bonus	(12,249.65)	.....	(12,249.65)	
Stand by & Vacation Wages	(1,498.79)	.....	(1,498.79)	
Stevedoring–Sydney	18,597.20	(18,597.20)	.....	
	26,045.22	(132,308.47)	(152,998.49)	46,735.24
*Total Cafeteria revenue	168,722.31	Crew board incl. therein		133,631.40
Total Cafeteria expense & costs	125,432.19			
Cafeteria net revenue	43,290.12			
Percent of crew board to total gross revenue				79.20197
79.20197% of $43,290.12 (Cafeteria net gain eliminated)				34,268.63

Note: Items within ( ) should be red ink.

[fol. 69] The Oceanic Steamship Company

Schedules

Schedule D—Balance Sheets.
E—Reconciliation of Net Income and Analysis of Changes in Surplus.
Item 10a—Other Income.
" 16 —Taxes.
" 17 —Losses.
" 20 —Depreciation.

[fol. 70] Matson Navigation Company

Oceanic Steamship Company

Schedule D

Balance Sheets

Assets	Jan. 1, 1930	Dec. 31, 1930
Cash	$814,172.75	61,865.10
Accounts Receivable	202,827.78	48,321.52
Depreciable Assets	533,221.09	3,843,063.65
Deferred Charges	373,414.97	59,869.49
Investments	974,210.00	524.210.00
Spare Gear & Machinery	69,911.03	76,106.03
Total Assets	2,967,757.62	4,613,435.79
Liabilities		
Indebtedness	1,304.35	8,970.91
Federal Taxes Accrued	117,842.60	72,602.15
Deferred Credits	.....	10,755.76
Reserve for Self-Carried Marine Insurance	34,391.56	27,484.43
Reserve for Major Repairs	81,042.33	86,732.26
Reserve for Protection & Indemnity Insurance	17,212.64	26,608.24
Reserve for Cargo Loss & Damage	3,796.00	6,495.62
Capital Stock	1,500,000.00	1,500,000.00
Paid in Surplus	.....	1,100,000.00
Earned Surplus	1,212,168.14	1,773,786.42
Total Liabilities	2,967,757.62	4,613,435.79

Reconcilement of Depreciable Assets

Cost per Books, Item 20	1,232,517.67	1,256,304.84
Construction New Steamers	.....	3,528,622.27
	1,232,517.67	4,784,927.11
Deduct:		
Reserve for Depreciation	577,319.61	819,886.49
Reserve for Obsolescence	121,976.97	121,976.97
Total Deductions	699,296.58	941,863.46
Depreciable Assets, as above	533,221.09	3,843,063.65

[fol. 71] Matson Navigation Company

Oceanic Steamship Company

Schedule E

Reconciliation of Net Income and Analysis of Changes in Surplus

1. Net Income from Item 24		$709,098.44
4. Charges Against Reserves for Contingencies:		
(a) Repairs Reserve		54,310.07
(b) Marine Insurance Reserve		28,797.09
(c) Protection & Indemnity Insurance Reserve		3,229.43
(d) Cargo Loss and Damage Reserve		2,400.38
(e) Stevedoring Arbitrary		26,070.45
		823,905.86
13. Unallowable Deductions:		
Additions to Reserves for Contingencies:		
(j) (1) Repair Reserve, Item 4a	60,000.00	
(2) Marine Insurance Reserve	21,889.96	
(3) Protection & Indemnity Ins.	12,625.03	
(4) Cargo Loss & Damage Reserve	5,100.00	
(5) Stevedoring Arbitrary	26,070.45	
Other Unallowable Deductions:		
(j) (1) Excess Depreciation, Item 20	63,999.99	
Federal Taxes Estimated	72,602.15	
		262,287.58
7. Net Profit for the Year as Shown by the Books		561,618.28
8. Surplus at Close of Preceding Taxable Year		1,212,168.14
12. Surplus at Close of Taxable Year, Schedule D		1,773,786.42

[fol. 72] Matson Navigation Company

Oceanic Steamship Company

Item 10a—Other Income

Commissions	$30,911.30
Stevedoring	18,597.20
Miscellaneous	5,058.48
Exchange	2,513.42
Discount	56.43
Total	57,136.83

Item 16—Taxes

Australian Taxes	8,102.36
Suva Taxes	2,651.52
San Francisco Personal Property Tax	917.23
Stamp Tax	291.75

Item 16—Taxes (continued)

Corporation Franchise Tax		25.00
Honolulu Taxes		10.00
Total		11,997.86
Less Deferred to Year 1931		3,077.91
Net Total		8,919.95

Item 17—Losses

Marine Insurance Losses & Expense		28,797.09
"S.S. Sierra"	4,259.26	
"Sonoma"	2,531.25	
"Ventura"	22,006.58	
Protection & Indemnity Losses & Expense		3,229.43
Cargo Loss & Damage Claims, less Salvage		2,400.38
Total		34,426.90

[fol. 73]

Matson Navigation Company

Oceanic Steamship Company

Item 20

Assets and Depreciation

Assets	Cost per books	Revenue agent's adjustments	Estimated salvage value	Additions not depreciated	Depreciable amount	Net value Dec. 31, 1930
S. S. "Sierra"	$400,000.00	8,000.00	40,000.00	.....	352,000.00	128,383.57
"Sonoma"	400,000.00	8,000.00	40,000.00	.....	352,000.00	129,425.66
"Ventura"	400,000.00	8,000.00	40,000.00	.....	352,000.00	130,575.35
Total Vessels	1,200,000.00	24,000.00	120,000.00	.....	1,056,000.00	388,384.58
Molasses Equipment	40,000.00	.....	.....	40,000.00	.....	40,000.00
Sydney Equipment:						
Wharf	5,136.46	.....	.....	.....	5,136.46	919.13
Furniture & Fixtures	4,438.80	.....	.....	372.48	4,066.32	2,650.67
Automobiles	2,280.00	.....	.....	.....	2,280.00	1,710.00
San Francisco Fur. & Fixtures	2,339.28	.....	.....	.....	2,339.28	1,391.56
New York Fur. & Fixtures	94.03	.....	.....	.....	94.03	43.38
Suva Wharf	838.84	.....	.....	125.12	713.72	696.10
Pago Pago Furniture & Fixtures	100.18	.....	.....	.....	100.18	54.26
Pago Pago Wharf	1,012.25	.....	.....	.....	1,012.25	529.67
Suva Furniture & Fixtures	65.00	.....	.....	.....	65.00	39.00
Total Assets	1,256,304.84	24,000.00	120,000.00	40,497.60	1,071,807.24	436,418.35

Depreciation	Res. Jan. 1, 1930	1930 Depr. per books	1930 Depr. Item 20	Excess Depr. Sch. L. (J) (1)	Trans. to Repair Res.	Res. Dec. 31, 1930
S. S. "Sierra"	191,658.51	80,000.00	58,666.67*	21,333.33	(42.08)	271,616.43
"Sonoma"	190,574.34	80,000.00	58,666.67*	21,333.33	.....	270,574.34
"Ventura"	189,424.65	80,000.00	58,666.67*	21,333.33	.....	269,424.65
Total Vessels	571,657.50	240,000.00	176,000.01	63,999.99	(42.08)	811,615.42
Sydney Equipment:						
Automobiles	.....	570.00	570.00	.....	.....	570.00
Wharf	3,190.04	1,027.29	1,027.29	.....	.....	4,217.33
Furniture & Fixtures	1,381.50	406.63	406.63	.....	.....	1,788.13
San Francisco Fur. & Fixtures	713.79	233.93	233.93	.....	.....	947.72
New York Furniture & Fixtures	41.25	9.40	9.40	.....	.....	50.65
Suva Furniture & Fixtures	19.50	6.50	6.50	.....	.....	26.00
Pago Pago Furniture & Fixtures	35.90	10.02	10.02	.....	.....	45.92
Pago Pago Wharf	280.13	202.45	202.45	.....	.....	482.58
Suva Wharf	.....	142.74	142.74	.....	.....	142.74
Total Depreciation	577,319.61	242,608.96	178,608.97	63,999.99	(42.08)	819,886.49

* 16.667% of Depreciable Amount as allowed by Revenue Agent.

Note: Items within ( ) should be red ink.

[fol. 74] Matson Terminals, Inc.

Schedules

Schedule D—Balance Sheets.
E—Reconciliation of Net Income and Analysis of Changes in Surplus.
Item 16—Taxes.
" 20—Depreciation.

[fol. 75] Matson Navigation Company

Matson Terminals, Inc.

Schedule D—Balance Sheets

Assets	Jan. 1, 1930	Dec. 31, 1930
Cash	$16,294.36	41,749.13
Accounts Receivable	143,528.36	74,765.40
Depreciable Assets	106,705.58	117,109.17
Deferred Accounts	748.77	1,845.51
Total Assets	267,277.07	235,469.21
Liabilities		
Accounts Payable	45,077.61	28,693.37
Federal Taxes Accrued	36,825.38	36,400.00
Own Insurance Reserve	1,444.54	
Capital Stock	150,000.00	150,000.00
Surplus	33,929.54	20,375.84
Total Liabilities	267,277.07	235,469.21

[fol. 76] Matson Navigation Company

Matson Terminals Inc.

Schedule E—Reconciliation of Net Income and Analysis of Changes in Surplus

1. Net Income, Item 24	$298,608.20
2. (f-1) Additional Depreciation	2,834.56
5. Total	301,442.76

Schedule E—Reconciliation of Net Income and Analysis of Changes in Surplus—Continued

Deduct:		
13. (a) Donations	41.00	
(f-2) Own Insurance Reserve Additions	465.72	
(k-1) Federal Income Taxes Estimated	36,400.00	36,906.72
7. Net Profit as shown by the books		264,536.04
8. Surplus close of preceding taxable year		33,929.54
9. (a) Insurance Reserve Transferred		1,910.26
10. Total of lines 7 to 9 inclusive		300,375.84
15. (a) Dividends Paid		280,000.00
12. Surplus at close of taxable year, Schedule D		20,375.84

[fol. 77] Matson Navigation Company

Matson Terminals, Inc.

Item 16—Taxes

Hawaiian Islands Taxes	$1,383.55
San Francisco Personal Property	806.48
Corporation Franchise Tax—Calif	423.22
Corporation Franchise Tax—Wash.	50.30
Seattle Personal Property Tax	313.20
Licenses	18.10
Total	$2,994.85
Less Deferred to Year 1931	403.24
Item 16	$2,591.61

[fol. 78]

Matson Navigation Company

Matson Terminals Inc.

Item 20

Assets	Cost	Depreciation Jan. 1, 1930	1930 Deprec'n.	Reserve Dec. 31, 1930	Net value
San Francisco Wharf Eqpt.:					
20% of cost 1925–29	$121,515.57	45,173.75	24,303.11	68,843.62	52,671.95
Less 1925 Deprec. (Part of Yr.)	.....	.....	633.24		
Net Depreciation	.....	.....	23,669.87		
Honolulu Wharf Equipment:					
20% of Cost 1925–29	28,191.69	17,414.26	5,638.34	22,782.02	5,409.67
Less 1925 Deprec. (Part of Yr.)	.....	.....	270.58		
Net Depreciation	.....	.....	5,367.76		
Hilo Wharf Equipment:					
20% of Cost 1925–29	7,954.86	5,723.07	1,590.97	7,218.92	735.94
Less 1925 Deprec. (Part of Yr.)	.....	.....	95.12		
Net Depreciation	.....	.....	1,495.85		
Crockett Wharf Equipment:					
20% of Cost—1929	3,253.53	1,905.01	650.71	2,555.72	697.81
Western Refinery Wharf Eqpt.:					
20% of Cost—1929	274.30	164.58	54.86	219.44	54.86
Seattle Equipment:					
Trucks & Dock Eqpt. 20% of Cost 1925–29	16,823.97	9,597.89	3,365.79	12,962.68	3,861.29
Deprec'n. previously eliminated now restored	30,608.79	.....	.....	30,608.79	
Office Furniture & Fixtures, 10% of cost 1923–29	1,862.34	411.76	186.23	597.99	1,264.35

Deprec'n. previously eliminated now restored	894.90	.....	.....	894.90	
Automobiles—Cost to Dec. 31, 1930	3,125.00	.....	462.51	462.51	2,662.49
	214,504.95	80,390.32	35,253.58	147,146.59	67,358.36
1930 Additions not Depreciated	44,562.59	.....	.....	.....	44,562.59
Hilo Warehouse not Depreciated	5,188.22	.....	.....	.....	5,188.22
Total per Schedule D	264,255.76	.....	.....	147,146.59	117,109.17
Depreciation as above	.....	.....	35,253.58		
Add Depreciation on 1928 Repairs:					
Total Repairs	8,503.68				
1930 proporition 1/3	.....	.....	2,834.56		
Depreciation, Item 20	.....	.....	38,088.14		

(Here follow photolithographs, side folios 79 and 79a.)

SCHEDULE E—RECONCILIATION OF NET INCOME AND ANALYSIS OF CHANGES IN SURPLUS

(Copy of Schedule L of Federal Income Tax Return)

1. Net income from Item 24, page 4, of the return	$				13. Unallowable deductions:			
2. Non-taxable income:					(a) Donations, gratuities, and contributions	$		
(a) Interest on Federal, State, Municipal and other bonds					(b) Income and profits taxes paid to the United States or its possessions or foreign countries			
(b) Dividends deductible					(c) Federal taxes paid on tax-free covenant bonds			
(c) Proceeds of life insurance policies paid upon the death of the insured					(d) Special improvement taxes			
(d) Other items of non-taxable income					(e) Furniture and fixtures, additions, or betterments treated as expenses on the books			
3. Charges against reserve for bad debts					(f) Replacements and renewals			
4. Charges against reserves for contingencies, etc.					(g) Insurance premiums paid on the life of any officer or employee			
5. Total lines 1 to 4, inclusive	$				(h) Interest on indebtedness incurred or continued to purchase or carry obligations or securities the interest upon which is wholly exempt from taxation			
6. Total from line 14					(i) Additions to reserve for bad debts			
7. Net profit for year, as shown by books, before any adjustments are made therein	$	SCHEDULE ATTACHED			(j) Additions to reserves for contingencies			
8. Surplus and undivided profits as shown by balance sheet close of preceding taxable year					(k) Other unallowable deductions			
9. Other credits to surplus					14. Total of line 13	$		
10. Total of lines 7 to 9, inclusive	$				15. Dividends paid during the taxable year:			
11. Total from line 17					(a) Amount paid in cash			
12. Surplus and undivided profits as shown by balance sheet at close of taxable year	$				(b) Amount paid in stock			
					16. Other debits to surplus			
					17. Total of lines 15 and 16	$		

AFFILIATIONS WITH OTHER CORPORATIONS

1. Was your income for the taxable year ended in 1930 included in any Federal consolidated return? No
2. Does the corporation own 95 per cent or more of the outstanding capital stock of another domestic corporation or of other corporations? ____ If answer is "yes" give names (Name)
3. Is 95 per cent or more of your outstanding capital stock owned by another corporation? ____
4. Is 95 per cent or more of your outstanding capital stock as well as 95 per cent or more of the outstanding capital stock of another corporation or of other corporations owned by the same interests? ____

PREDECESSOR BUSINESS

5. Was the corporation in any way an outgrowth, result, continuation, or reorganization of a business or businesses in existence during this year? ____ If answer is "yes," give name and address of each predecessor business:
6. Upon such change were any asset values increased or decreased?
7. If the answer is "yes," closing balance sheets of old business and opening balance sheets of new business must be furnished.

BASIS OF RETURN

8. Is this return made on the basis of actual receipts and disbursements? ____ If not, describe fully what other basis or method was used in computing net income:

Proper Accounting Methods

VALUATION OF INVENTORIES

9. State whether the inventories at the beginning and end of the taxable year were valued at cost, or cost or market, whichever is lower. If other basis was used, describe fully, state why used and the date inventory was last reconciled with stock:

CAPITAL STOCK

10. No. shares outstanding: Common 244,521; Preferred ____ Par value: Common $ 24,432,100.00; Preferred $ ____

AFFIDAVIT OF PRESIDENT, VICE PRESIDENT, SECRETARY OR TREASURER

STATE OF CALIFORNIA
City and County of San Francisco } ss.

I, R. P. Hasenauer, being duly sworn, depose and say that I am Treasurer (Insert official title) of Matson Navigation Company (Name of bank or corporation); that I am an executive officer thereof; and that the facts set forth in the foregoing return are, in all respects, full, true and correct.

R. P. Hasenauer

Subscribed and sworn to before me this 13th day of March, 31

Katherine Hallohan, Notary Public, in and for the City and County of San Francisco, State of California

42A

SCHEDULE C—ALLOCATION OF INCOME

(To be filed out by corporations doing business both within and without the state)

For the purpose of determining the proportion of net income arising from business done within and without the state, the following information must be given (See Instructions):

	Total within and without the state (a)	Total within the state (b)	Per centum within the state (b) ÷ (a)
(1) Average monthly value (actual) of real and tangible personal property	$	$	
(2) Wages, salaries, commissions and other compensation of employees	$	$	
(3) Gross sales (attach schedule showing basis)	$	$	
Total per centum (sum of the percentages above)			(c)
Average per centum (1/3 of (c) carried to Schedule B, Item 45)			(d)

SCHEDULE D—COMPARATIVE BALANCE SHEETS

(Copy of Schedule K of Federal Income Tax Return)

ITEMS	BEGINNING OF TAXABLE YEAR	END OF TAXABLE YEAR
ASSETS		
1. Cash	$	$
2. Notes receivable		
3. Accounts receivable		
Total receivable		
Less reserve for bad debts		
4. Inventories		
5. Investments:		
Federal, State and Municipal bonds		
Other investments		
6. Loans		
7. Deferred charges:		
Prepaid taxes		
Other deferred charges		
8. Capital assets:		
Land SCHEDULE ATTACHED		
Buildings		
Machinery, furniture, fixtures and equipment		
Less reserve for depreciation and depletion		
9. Patents		
10. Good will		
11. Other assets		
12. TOTAL ASSETS	$	$
LIABILITIES		
13. Notes payable	$	$
14. Accounts payable		
15. Accrued expenses		
16. Other liabilities		
TOTAL		
17. Capital stock:		
Preferred stock (less stock in treasury)		
Common stock (less stock in treasury)		
18. Surplus		
19. Undivided profits		
Net worth	$	$
20. TOTAL LIABILITIES		

ENCLOSE SCHEDULES BUT PLEASE DO NOT FASTEN ANY PAPERS TO THIS RETURN

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79-A

423

[fol. 80] EXHIBIT "B" TO APPEAL

State of California, Office of Franchise Tax Commissioner, Sacramento

No. 15951

Notice of Additional Franchise Tax proposed to be assessed

Matson Navigation Co.,
215 Market Street,
San Francisco, Calif.

Date: March 5, 1932.

32463

Bank and Corporation Franchise Tax return for taxable year ended December 31, 1930, as transmitted by the above corporation has been examined and the correct amount of the tax determined by the Commissioner, and it is proposed to assess an additional tax in the amount of $101,045.92. The details of the proposed additional assessment and of computing said tax are set forth below.

Amount of tax must be transmitted to the Franchise Tax Commissioner by certified check or money order payable to the State Treasurer. Interest must be added at six per cent per annum from the due date, March 15, 1931, to the date of payment.

Item 43	Net income both within and without the State from Schedule A	$3,256,506.03
25	Interest on federal, state and municipal bonds: Section 6 provides that gross income shall include gains, profits, and income derived from the business of whatever kind and nature	186,150.16
	Revised net income allocated 100% to Calif	$3,442,656.19
44	4%	137,706.24
45	Offset	17,051.05
46		120,655.19
47	Add: 4% of offset	682.04

Total tax assessed		121,337.23
Less tax liability assessed:		
Acknowledgment No. 17355	$12,845.30	
Proposed assessment No. 13255	7,446.01	20,291.31
Additional tax		$101,045.92

This notice of additional franchise tax proposed to be assessed is forwarded to the taxpayer whose name appears hereon in accordance with the provisions of the Bank and Corporation Franchise Tax Act, Section 25 (see reverse side of this notice).

Interest as called for above must be included in remittance.

Chas. J. McColgan, Franchise Tax Commissioner,
by Richard P. Lowe.

GEZ.

[fol. 81] EXHIBIT "C" TO APPEAL

State of California, Office of Franchise Tax Commissioner

Sacramento

Matson Navigation Co.,
215 Market Street,
San Francisco, California.

32463

Notice of Action of Franchise Tax Commissioner Upon Taxpayer's Protest

Dated at Sacramento, California,
November 23, 1932.

You are hereby notified that pursuant to the terms of Section 25 of the Bank and Corporation Franchise Tax Act and the protest which you filed complaining of the computation and levy of your tax by the Franchise Tax Commissioner under said act as disclosed by return filed for the taxable year beginning January 1, 1930, and ended December 31, 1930, as set forth in Notice of Additional

Franchise Tax Proposed to be Assessed, No. 05951; dated March 5, 1932, in the amount of $101,045.92.

The computation and levy complained of have been reconsidered by the Franchise Tax Commissioner and he has acted upon said protest as follows:

In view of the evidence adduced at conference and hearings, liability is determined in accordance with the following computation:

Total tax assessed		$39,929.02
Less: Acknowledgment No. 17355	$12,845.30	
Proposed assessment No. 13255	7,445.01	20,291.31
Revised additional tax		$19,637.71

Interest has accrued on the deficiency at the rate of 6% per annum from March 15, 1931.

Yours very truly, Chas. J. McColgan, Franchise Tax Commissioner. Chas. A. Temple, Auditor.

CAT:EB.

[fol. 82] BEFORE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of MATSON NAVIGATION COMPANY, THE OCEANIC STEAMSHIP COMPANY, and MATSON TERMINALS, INC.

MINUTES OF THE BOARD

Wednesday, May 1, 1933.

On this day there came on regularly for hearing the matter of the appeal of Matson Navigation Co., The Oceanic Steamship Company, and Matson Terminals, Inc., from the action of the Franchise Tax Commissioner in overruling their protest to a proposed assessment of an additional tax of $19,637.71, based upon their return for the year ended December 31, 1930.

The appellants were represented by Mr. Gregory A. Harrison, attorney, and Mr. F. A. Bailey, Vice President and Secretary of Matson Navigation Company. Mr. Chas. J. McColgan, Franchise Tax Commissioner, appeared in

his own behalf. After receiving evidence, both oral and [fol. 83] documentary, now upon motion of Mr. Stewart, seconded by Mr. Cattell and duly carried, it is ordered that the matter be taken under consideration for final determination of the Board.

Upon motion of Mr. Stewart, seconded by Mr. Cattell and duly carried, it is ordered that the appellants be allowed ten days in which to file additional memoranda in support of their appeal.

Frank M. Keesling, Assistant Secretary.

[fol. 84] BEFORE STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of MATSON NAVIGATION CO., THE OCEANIC STEAMSHIP COMPANY, and MATSON TERMINALS, INC.

Appearances:

For appellants: Mr. Gregory A. Harrison, Attorney of Brobeck, Phleger & Harrison, and Mr. F. A. Bailey, Vice President and General Manager of Matson Navigation Co.

For respondent, Honorable Chas. J. McColgan, Franchise Tax Commissioner.

OPINION

These are appeals pursuant to Section 25 of the Bank and Corporation Franchise Tax Act (Chap. 13, Stats. 1929, as amended) from the action of the Franchise Tax Commissioner in overruling the protests of Matson Navigation Co., The Oceanic Steamship Company and Matson Terminals, Inc. to a proposed assessment of an additional tax of $19,637.71 for the year 1931 based upon their returns for the calendar year ended December 31, 1930.

It appears that the appellants are corporations incorporated under the laws of this state, and, in addition to [fol. 85] being engaged in business of a purely local character, are engaged largely in the business of transporting persons and property by vessels operating between ports on the Pacific Coast, including ports in California, and ports in Hawaii, the South Seas, Australia and New Zealand.

In their return for the year ended December 31, 1930, the appellants did not report as subject to the Franchise Tax, imposed by the Act, any portion of their income from their business done in interstate or foreign commerce. The Commissioner, however, allocated to business done in this state that portion of appellants' income from their business done in interstate and foreign commerce which the amount of business originating in this state bore to the total business done, and upon the basis of such allocation proposed the additional assessment in question.

Appellants contend that the Act cannot and should not be construed as imposing a tax measured by income derived from business done in interstate or foreign commerce, even though such a tax were within the power of the state to impose. In support of this contention, appellants argue that nowhere does the Act specifically provide that income from business done in interstate or foreign commerce shall be included in the measure of the tax but on the contrary, the Act provides that the tax shall be [fol. 86] be measured only by income from local or intrastate business.

We are unable to find any provision in the Act from which it can be inferred that the measure of the tax is confined solely to income from purely local or intrastate business. Although it is true that the Act does not specifically provide that income from business done in interstate or foreign commerce shall be included in the measure of the tax, we do not believe that such a specific provision is necessary to include such income, if the language used in sufficiently broad to include it and if it is not specifically excluded.

Section 4 of the Act as it read in 1931 provided that "every financial mercantile, manufacturing and business corporation doing business within the limits of this State of the classes referred to in subdivision 2(a) of section 16 of Article XIII of the Constitution of this State, shall annually pay to the State for the privilege of exercising its corporate franchises within this State, a tax according to or measured by its net income."

Under this section, considered alone, it would seem that if a corporation of the classes mentioned does any business in this state, the tax should be measured by its entire net income, regardless of the source from which that income

is derived, whether from purely local business or from [fol. 87] business done in interstate or foreign commerce.

However, section 10 of the Act, after stating that if the entire business of the corporation is done within this State, the tax shall be measured by its entire net income, provides that in case the entire business of the corporation is not done within this State, the tax shall, in order to avoid double taxation, be measured by that portion of the net income reasonably attributable to business done within this state.

Although, Section 10, in the interests of avoiding double taxation, limits the provisions of section 4 of the Act to the extent of excluding from the measure of the tax, income derived from business done outside the state, there is nothing in this section from which it could be inferred that that portion of the income from business done in interstate or foreign commerce which is reasonably attributable to business done in this state should be excluded from the measure of the tax.

The appellants argue that insofar as they are engaged in business in interstate or foreign commerce, they are not doing business within this state. This argument is manifestly unsound. It is apparent that even business done in interstate or foreign commerce must be done somewhere and it must be done either entirely within the state, en- [fol. 88] tirely without the state or partly within and partly without the state. There are no other alternatives. Thus appellants' argument would be valid only if their business done in interstate or foreign commerce were transacted wholly without the state. The very fact that appellants are engaged in interstate commerce between this state and other states, and in foreign commerce between this state and foreign countries, would seem to exclude the possibility that all of such business is done entirely without the state. Furthermore, as a matter of fact, appellants, as an incident to the conduct of their transportation business, engage in numerous activities here, such as the maintenance of offices for the sale of tickets and for the receipt of orders, and the loading and unloading of passengers and freight, etc. These activities, we think, clearly constitute doing business in this state.

In further support of their contention that the act cannot or should not be construed as including income derived

from business done in interstate or foreign commerce in the measure of the tax, appellants present an argument based upon the fact that the Act makes no distinction between domestic and foreign corporations but imposes the tax, and specifies the income which shall be used as a measure of the tax, in terms applicable alike to both domestic [fol. 89] and foreign corporations. From this fact, appellants draw the inference that if the Act be construed to impose a tax upon domestic corporations, such as appellants, which are doing business in this state, measured by income derived from business done in interstate or foreign commerce, the Act must also be construed to impose a tax upon foreign corporations doing business here measured by income derived from business done in interstate or foreign commerce. But, appellants argue, it is beyond the power of the state to impose a tax upon foreign corporations measured by income derived from business done in interstate or foreign commerce. Furthermore, appellants maintain that the provisions of the act imposing the tax and providing for the measure of the tax cannot be severed and held valid with respect to domestic corporations if they are invalid with respect to foreign corporations. Accordingly, appellants conclude that if the Act is construed as imposing the tax upon domestic corporations measured by income derived from interstate or foreign commerce, the entire Act is rendered unconstitutional.

This argument, we believe is based upon a misunderstanding of the Act and upon a misconception of the power of the state to impose a Franchise Tax upon foreign corporations doing business in this State.

[fol. 90] It is true that it has been held that the state may not impose a franchise tax, whether measured by net income or otherwise, upon foreign corporations doing business within the state, if the foreign corporation's business is exclusively interstate in character and if it does no local business whatsoever, (Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203, 45 Supp. Ct. 477; Anglo-Chilean Nitrate Sales Co. vs. Alabama, 53 Supp. Ct. 373; People vs. Pacific Alaska Steamship Co. 182 Cal. 202). Presumably, a similar rule is applicable to foreign corporations whose business is exclusively of a foreign commerce character.

However, although the Act, as appellants argue, does not distinguish in so many words between domestic and foreign corporations, and even though the Act be construed as imposing a tax upon domestic corporations measured by income for business done in interstate or foreign commerce, it does not follow that the Act must be accorded a similar construction with respect to foreign corporations engaged exclusively in interstate or foreign commerce. Under the provisions of section 4 of the Act, quoted above, the tax is imposed upon financial, mercantile, manufacturing and business corporations doing business in this state of the classes referred to in subdivision 2 (a) of section 16 of Article XIII of the Constitution. Subdivision 2 (a) of [fol. 91] section 16 of Article XIII as it read prior to the amendments adopted by the people on June 27, 1933 (as amended, section 16 does not contain a subdivision numbered 2 (a)) refers only to those financial, mercantile, manufacturing and business corporations doing business within the limits of this state which are subject to be taxed pursuant to subdivision (d) of section 14 of Article XIII. Section 14(d), it is to be noted, provides that with certain exceptions, such as the franchises of public utility corporations, all franchises shall be taxed at their full cash value. It was pursuant to this section that franchises of general corporations were taxed prior to the adoption of section 16 of Article XIII and the enactment of the Bank and Corporation Franchise Tax Act.

Foreign corporations engaged exclusively in interstate or foreign commerce, not being subject to a franchise tax were thus not subject to be taxed pursuant to section 14 (d) (see People vs. Alaska Pacific Steamship Co., supra, expressly so holding) and thus by the very terms of the Act, itself, are not subject to the tax imposed by the Act. Consequently, appellants' argument to the effect that if the Act is to be construed as including in the measure of the tax income of domestic corporations derived from business done in interstate or foreign commerce, it must also [fol. 92] be construed in a similar fashion with respect to foreign corporations is unsound insofar as foreign corporations engaged exclusively in interstate or foreign commerce are concerned.

A different situation is presented with respect to foreign corporations doing some local or intrastate business here.

Undoubtedly, such corporations were subject to be taxed pursuant to section 14 (d) of Article XIII and, consequently, are subject to the tax imposed by the Act. Thus, if the Act is construed as including in the measure of the tax on domestic corporations a portion of their income derived from business done in interstate or foreign commerce, it must also be construed, inasmuch as no distinction is made between domestic and foreign corporations, subject to the Act, as providing that a portion of the income derived from interstate or foreign corporations doing local or intrastate business here.

But contrary to appellants' statements, we believe it is entirely within the power of the state to impose a franchise tax upon foreign corporations doing local or intrastate business here and to measure that tax by income properly attributable to business done within the state, regardless of whether the business is intrastate business or whether it is of an interstate or foreign commerce character.

[fol. 93] It has been held that a franchise tax measured by net income is not to be regarded as a tax upon income, and, consequently, there may be included in the measure of the tax, income, such as income from tax exempt bonds, which cannot be taxed directly (Flint vs. Stone Tracy Co. 220 U. S. 107, 31 Sup. Ct. 343; Pacific Co. vs. Johnson, 212 Cal. 148, 285 U. S. 480). Thus it would seem arguable that if a corporation exercises a franchise granted by the state, the state may tax the franchise and include in the measure of the tax, income derived from interstate or foreign commerce business, even though such income could not be taxed directly. However, it has been held that a tax imposed upon net income including income derived from transactions in interstate or foreign commerce does not amount to burdening interstate or foreign commerce, and is valid (U. S. Glue Co. vs. Oak Creek, 247 U. S. 321, 38 Sup. Ct. 499; Peck & Co. vs. Lowe, 247 U. S. 165, 38 Sup. Ct. 432). Clearly, it would seem that a franchise tax measured by net income does not burden interstate or foreign commerce if a tax levied directly upon net income does not have that effect.

But appellants argue that the principles applicable to a state's power to impose franchise taxes measured by net income are entirely different from the principles applicable

to a state's power to impose taxes upon net income. Although there are differences, the principal difference, we believe, is that a franchise tax, as pointed out above, may [fol. 94] be measured by income which cannot be taxed directly.

It is true that in Alpha Portland Cement Co. vs. Massachusetts, supra, it was held that a franchise tax, measured by net income, could not be imposed upon a foreign corporation engaged exclusively in interstate commerce, whereas in view of the decisions in U. S. Glue Co. vs. Oak Creek; and Peck & Co. vs. Lowe, supra, to the effect that a tax on income is not a burden upon interstate or foreign commerce, and in view of the decision in Shaffer vs. Carter, 252 U. S. 37, 40 Sup. Ct. 221, to the effect that the net income of a non-resident from business done in the state may be taxed, it would seem arguable that a state could impose a tax directly upon the net income of a foreign corporation from business done in the state, even though the business was exclusively interstate in character. This possible difference in a state's power to impose franchise taxes measured by net income and direct net income taxes is explainable, we think, on the grounds that a foreign corporation engaged exclusively in interstate commerce, although doing business within the state and therefore subject to a direct net income tax, cannot be regarded as exercising a franchise or privilege granted by the state upon which a franchise tax can be imposed.

This difference does not hold true, we believe, with re- [fol. 95] spect to foreign corporations doing some local or intrastate business in the state. If the foreign corporation does some local or intrastate business and thereby exercises a franchise or privilege granted by the state, the state may require the corporation to pay for that privilege a tax measured by its net income attributable to business done in the state, regardless of whether the income is derived from intrastate business or from business done in interstate or foreign commerce. The cases of Underwood Typewriter Co. vs. Chamberlain, 254 U. S. 113, 41 Sup. Ct. 45; and Bass, Ratcliff & Gretton, Ltd. vs. State Tax Commission, 266 U. S. 271, 45 Sup. Ct. 82, squarely support this conclusion.

The following language of the court in the Underwood case completely refutes appellants' argument:

"A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. Postal Telegraph Cable Co. vs. Adams, 155 U. S. 688, 695. This tax is based upon the net profits earned within the State. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce is settled. U. S. Glue Co. v. Oak Creek, 247 U. S. 321; Shaffer vs. Carter, 252 U. S. 37, 57; compare Peck & Co. vs. Lowe, 247 U. S. 165. Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause."

Since it is within the power of the state to impose a franchise tax measured by income from business done within [fol. 96] the state, whether done in interstate or foreign commerce, upon all the foreign corporations which are subject to the Act, it follows that the act may be construed as including in the measure of the tax upon domestic corporations that portion of their income derived from business done in interstate or foreign commerce which is attributable to business done in California without thereby rendering the act unconstitutional for the reasons asserted by appellants.

What we have said in answer to appellant's second argument, in support of its contention that the Act cannot and should not be construed as providing that income from business done in interstate or foreign commerce should be included in the measure of the tax, largely disposes of appellant's third argument in support of this contention. This argument is to the effect that if the Act be construed in a manner contrary to that contended for by appellants, foreign corporations would be permitted to transact business in California on more favorable conditions than domestic corporations and the Act would thereby violate section 15 of Article XII of the Constitution which provides;

"No corporation organized outside the limits of this State shall be allowed to transact business within this State on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this State."

It appears that appellants in addition to being engaged [fol. 97] in interstate or foreign commerce are also engaged in some purely local or intrastate business. As we have seen, foreign corporations doing some local business here may be required to pay a franchise tax measured by income attributable to business done in this state even though of an interstate or foreign commerce character. According to appellants' own argument, the Act must be construed as being applicable alike to both foreign and domestic corporations. It follows that the Act cannot be regarded as permitting foreign corporations "similar" to appellants, i. e., corporations doing some local or intrastate business here, to transact business here on more favorable conditions than appellants.

It may be argued, however, that the same construction of the Act which would justify the proposed assessment in question would result in construing the Act as being applicable to domestic corporations engaged exclusively in interstate or foreign commerce. If so, it might be argued that the Act permits foreign corporations engaged exclusively in interstate or foreign commerce to transact business here on more favorable conditions than similar domestic corporations since such foreign corporations cannot be subjected to a franchise tax.

However, we are of the opinion that section 15 of Article XII, when properly construed, does not prohibit the State from taxing domestic corporations simply because it cannot [fol. 98] under the Constitution or laws of the United States also tax similar foreign corporations. This point, we think, was settled in Smith vs. Lewis, 211 Cal. 294, holding that the fact that the State is powerless to impose a license tax on a foreign corporation engaged in interstate commerce does not render a license tax on a domestic corporation a violation of section 15 of Article XII, (see also Roger J. Traynor, the Bank and Corporation Franchise Tax Act, ch. 20 of Ballantine's California Corporation Laws, P. 713, N. 76).

Appellants also assert in support of their contention regarding the application of the tax to income derived from business done in interstate or foreign commerce that, at the time the Act was in the course of passage through the Legislature, they were definitely assured by various state officials that income from transportation of persons and

property upon the high seas in interstate and foreign commerce would not be included in the measure of the tax. With all due respect to the officials to whom appellants have reference, we are of the opinion that the Act, as passed by the Legislature and approved by the Governor, does not exclude from the measure of the tax income attributable to business done in this State, simply because it may have been derived from the transportation of persons and property upon the high seas in interstate and foreign commerce. Un-
[fol. 99] questionably, of course, it is the Commissioner's duty to administer the Act, as finally passed by the Legislature, rather than in accordance with any "understanding" of the kind referred to by appellants.

In further support of their contention, appellants urge upon us that the predecessor of the Commissioner that proposed the additional assessment in question, consistently abided by the "understanding" above referred to, and did not require appellants to pay a tax measured by any portion of their income from their transportation business. However, appellants do not offer any reasons, other than those above considered and disposed of, for holding that the preceding Commissioner acted correctly in so doing. Obviously, the fact that a particular Commissioner fails properly to administer the Act by reason of an erroneous interpretation of the Act, or for other reasons, does not preclude either a subsequent Commissioner or this Board from adopting and enforcing a correct interpretation.

As a second contention, appellants maintain that even though the Act be construed to justify the assessment in question, the assessment is invalid for the reason that it is beyond the power of the State to impose a franchise tax upon appellants, measured by any portion of their income from their transportation business done in interstate or foreign commerce.

[fol. 100] But if it is within the power of the State to impose a franchise tax upon foreign corporations doing some local business here, measured by income from business done in this State, including income from business done in interstate or foreign commerce, it is clearly within the power of the State to impose a franchise tax, similarly measured, upon domestic corporations doing some local business here.

For that matter, it would seem that even though appellants were engaged exclusively in business of an interstate

or foreign commerce character, they must be regarded, inasmuch as they were incorporated under the laws of this State, as possessing franchises granted by this State, and for the privilege of exercising those franchises could be required to pay a tax measured at least by income from business done in this state and possibly by their entire net income. See Cream of Wheat Co. vs. County of Grand Forks, 253 U. S. 325, 40 Sup. Ct. 558, in which a franchise tax upon a domestic corporation measured by the entire value of the franchise was sustained, even though the business of the corporation was conducted entirely without the state and even though it had no tangible real or personal property within the State of incorporation. See also the following cases, holding that the State may impose a franchise tax on a domestic corporation, measured by total capital stock instead of merely by capital employed within the State: Kansas City, Fort Scott & Memphis Ry. vs. [fol. 101] Botkin, 240 U. S. 227, 36 Sup. Ct. 261; Kansas City, Memphis & Birmingham Ry. Co. vs. Stiles, 242 U. S. 111, 37 Sup. Ct. 58; and Roberts and Schaefer Co. vs. Emmerson, 271 U. S. 50, 46 Sup. Ct. 375.

Furthermore, it is to be noted that the tax imposed upon public utilities pursuant to section 14 of Article XIII of the Constitution, measured by gross receipts, including a portion of gross receipts from business done in interstate commerce, has been sustained on the theory that the tax was in lieu of a property tax which the State could constitutionally impose (Pullman Co. vs. Richardson, 185 Cal. 484, affirmed 261 U. S. 330). The tax imposed by the Act is in lieu of the tax imposed pursuant to section 14(d) of Article XIII (See section 16 of Article XIII as it read prior to the amendments adopted by the people on June 27, 1933). Inasmuch as the tax imposed pursuant to section 14 (d) has been held to be a property tax upon the so called "corporate excess" of the corporations subject to the tax (Miller & Lux vs. Richardson, 182 Cal. 115, and Schwab vs. Richardson), it would seem that the tax imposed should be held valid, even though measured by net income from business done in interstate or foreign commerce for the reason that it is in lieu of a property tax which the state could constitutionally impose upon appellants (See Schwab vs. Richardson, supra, holding that ap-

pellant, The Oceanic Steamship Company was subject to the [fol. 102] tax imposed pursuant to Section 14 (d)).

As a third contention, appellants maintain that even though the Act can be construed as requiring that a portion of their income from their transportation business should be included in the measure of the tax and even though the Act when so construed is constitutional, the Commissioner has included in the measure of the tax a far greater portion of their income from their transportation business than the Act contemplated should be included.

As noted above, the Act provides in Section 10 that in case the entire business of a corporation is not done within the State, the tax shall be measured by that portion thereof which is derived from business done within the State. This section further provides that the portion of net income derived from business done within the State

"shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacturer, payroll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to the business done within this State and to avoid subjecting the taxpayer to double taxation."

It appears that the Commissioner allocated to income from business done in the State that portion of appellants' income from its transportation business done within and without the state which the amount of the business origi- [fol. 103] nating in this state bore to the total business done. By this means, the Commissioner determined that approximately 22.2% of appellants' net income from their transportation business was attributable to business done in California. Appellants argue that the method of allocation employed by the Commissioner does not fairly apportion to the State that portion of their net income from their transportation business which is reasonably attributable to business done in the State. Appellants suggest that if any of their net income from their transportation business is to be allocated to business done in this state, only that portion of such income should be so allocated which the number of miles traversed by their vessels bears to the total number of miles bears to the total number of miles

traversed by their vessels. If this formula were employed, the net income attributable to business done in California would not exceed one-half of one per cent of the total net income from appellants' transportation business.

The objection to appellants' formula is that it emphasizes the actual transportation of passengers and property to the total disregard of other activities of appellants which, though incidental to the actual transportation of passengers and property, are, nevertheless, and, necessarily, must be, performed by appellants. Obviously, in order to transport passengers and property appellants must obtain passengers and property to transport. Furthermore, appellants must maintain facilities for the loading and unloading of property and for the embarking and disembarking of passengers transported. These factors [fol. 104] are completely disregarded by appellants' formula. Under that formula, the same percentage of income is attributed to California as would be attributed to California if appellants' vessels simply entered California ports and if none of their business originated or terminated here, and if no offices or other facilities were maintained here.

In view of the above, it seems clear that the Commissioner's formula more nearly allocates to the State that portion of the net income of appellants' transportation business which is reasonably attributable to business done within this State than does appellants formula. Furthermore, it is to be observed that if the other States, and the territories and foreign countries, in which appellants do business had franchise tax acts similar to our Act and should employ the formula employed by the Commissioner for the purpose of determining the amount of net income attributable to business done in such states, territories and foreign countries, respectively, the result would be that the full amount of appellants' net income from their transportation business would be allocated between this State and such other States and territories and foreign countries without in any way subjecting appellants to double taxation.

For the above reasons, we are of the opinion that the method employed by the Commissioner is a method of allocation fairly calculated to assign to the State that portion of appellants' net income from their transportation [fol. 105] business which is reasonably attributable to busi-

ness done within this State and which avoids subjecting the appellants to double taxation.

In view of this conclusion and in view of our conclusions regarding the construction of the Act and the power of the State to impose franchise taxes upon domestic corporations, measured by income from business done in interstate or foreign commerce, it follows that the action of the Commissioner in overruling appellants' protest to his proposed assessment of the additional tax in question must be sustained.

[fol. 106] BEFORE STATE BOARD OF EQUALIZATION OF CALIFORNIA

ORDER SUSTAINING ACTION OF COMMISSION

Pursuant to the views expressed in the opinion of the Board on file in this proceeding, and good cause appearing therefor,

It is hereby ordered, adjudged and decreed, that the action of Charles J. McColgan, Franchise Tax Commissioner, in overruling the protest of Matson Navigation Company, The Oceanic Steamship Company and Matson Terminals, Inc., against proposed assessments of additional taxes under Chapter 13, Statutes of 1929, as amended, be and the same is hereby sustained.

Done at Sacramento, California, this 15th day of February, 1934, by the State Board of Equalization.

R. E. Collins, Chairman; Fred E. Stewart, Member; Jno. C. Corbett, Member; H. G. Cattell, Member.

Attest: Dixwell L. Pierce, Secretary.

[fol. 107] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

STIPULATION AS TO FACTS—Filed Oct. 8, 1934

It is hereby stipulated by and between the parties to the above entitled action that the following facts be and they are hereby stipulated and agreed to for consideration by

the above named court upon hearing of the writ of review herein:

The additional tax referred to in Exhibit B to the petition herein, amounting to the sum of $19,637.71, was imposed as an additional assessment for the year 1931, and was based upon revenue assigned by the Franchise Tax Commissioner to business done within this state during the year ending December 31, 1930.

Matson Navigation Company is, and was at all times herein mentioned, engaged in the transportation of goods and passengers between ports in the Territory of Hawaii [fol. 107a] and ports on the Pacific Coast of the United States. All of the transportation business of the Matson Navigation Company is, and was at all said times, interstate and foreign. All of the revenue of Matson Navigation Company involved in the dispute, and upon which the said additional assessment was based, arose out of the transportation of passengers and merchandise in interstate and foreign commerce.

The Oceanic Steamship Company is and was at all times herein mentioned engaged in the transportation of passengers and goods between ports in the South Sea Islands, Australia and New Zealand and ports in the Territory of Hawaii and the Pacific Coast of the United States. All of its transportation business is, and was at all said times, interstate and foreign. All of the revenue of the Oceanic Steamship Company involved in the dispute, and upon which the said additional assessment was based, arose out of the transportation of passengers and merchandise in interstate and foreign commerce.

None of the transportation business of either of said companies is, or was at any of said times, intrastate in its nature. No goods, wares, merchandise or passengers are, or ever were, transported by either of said companies between points within the State of California.

It is only this revenue from interstate and foreign transportation business of Matson Navigation Company and The Oceanic Steamship Company upon which the additional assessment, the validity of which was assailed before the Board of Equalization and is now involved in this proceeding, is based. None of said additional assessment is based [fol. 107b] upon any income or revenue of the petitioner

Matson Terminals, Inc., but Matson Terminals, Inc., is concerned only in so far as it is a party to a consolidated return and therefore liable for such additional tax, if any, as may be determined to have been properly assessed.

Although the transportation business of Matson Navigation Company and The Oceanic Steamship Company was conducted exclusively in interstate and foreign commerce, and although the additional assessment in controversy was computed based entirely upon a part of the revenue derived from such transportation in interstate and foreign commerce, nevertheless the petitioners did engage, during the years 1930 and 1931, in other substantial activities of a purely intrastate character, the tax computed upon the revenue from such purely intrastate business having been already paid and not being involved in the present controversy.

It is the view of the Commissioner that, in computing the tax he did not levy a tax on income from interstate and foreign commerce as such, but included a portion, to wit, 22.2% of such income in petitioners' net income allocated to California. The petitioners contend that the Commissioner had no right to allocate to California any portion of such income. Respondents contend that, petitioners being domestic corporations, it was proper for the Commissioner to allocate to California a portion of the income from interstate and foreign commerce, based upon the percentage of such business originating in California.

Dated: October 3rd, 1934.

Brobeck, Phleger & Harrison, Attorneys for Petitioners. U. S. Webb, Attorney General, by H. H. Linney, Deputy Attorney General, Attorneys for Respondents.

[fol. 108] [File endorsement omitted]

[fol. 109] IN SUPREME COURT OF CALIFORNIA

In Bank

S. F. No. 15,137

MATSON NAVIGATION COMPANY, a Corporation; THE OCEANIC STEAMSHIP COMPANY, a Corporation, and Matson Terminals, Inc., a Corporation, Petitioners,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, John C. Corbett, Fred E. Stewart, R. E. Collins, H. G. Cattell and Ray L. Riley, the members of said State Board of Equalization, and Charles J. McColgan, Franchise Tax Commissioner of the State of California, Respondents.

OPINION—Filed March 27, 1935

BY THE COURT:

Petitioners bring this proceeding under section 30 of the Bank & Corporation Franchise Tax Act (Stats. of 1929, p. 19), as such section was amended in 1933. (Stats. of 1933, p. 692.) This is apparently the first case to reach this court under the procedure therein provided. That section, as amended, provides that any corporate tax payer dissatisfied with the assessment levied against it by the Franchise Tax Commission, and after having unsuccessfully appealed to the State Board of Equalization, within 60 days of the decision of that Board, may apply to this Court for a writ of certiorari or review, for the purpose of testing the lawfulness of the order of the Board; that in such proceeding [fol. 110] the cause is to be heard on the record of the Board as certified by it; that no new or additional evidence may be taken in this court; that the findings and conclusions of the Board are final on all questions of fact; that this Court is limited in its review to determining whether the Board has regularly pursued its authority, including the determination as to whether the state or federal constitution has been violated; that upon the hearing this Court shall enter judgment either affirming or setting aside the order or decision of the Board.

The facts giving rise to the present controversy are as follows:

Petitioners are domestic corporations engaged in both intrastate and interstate or foreign commerce. The Matson Navigation Company, in addition to certain purely intrastate activities, is engaged in the business of transporting passengers and freight between ports on the Pacific Coast, including California ports and ports in Hawaii. The Oceanic Steamship Company, in addition to certain purely intrastate activities, is engaged in the business of transporting passengers and freight between ports on the Pacific Coast, including California ports, and ports in Hawaii, the South Seas, Australia and New Zealand. The Matson Terminals, Inc., is interested in this proceeding only in so far as it is a party to a consolidated return. No portion of the tax here under attack is apportionable to this company. All of the transportation activities of the two other petitioners are interstate or foreign.

The tax here under attack is that imposed for the year 1931, measured by the net income of these companies, as provided in the act, for the preceding year. These companies, in filing their return for 1931, omitted from their net income all portions thereof derived from interstate or [fol. 111] foreign commerce. They paid a tax of $12,845.30, computed by applying to their net income, derived solely from intrastate commerce, the statutory rate. In 1930, petitioners made a net income of $2,526,148.22 from their interstate or foreign commerce, a considerable portion of which originated in California. This was entirely omitted from their 1931 return. The Franchise Tax Commission, after notice and a hearing, imposed an additional tax of $19,637.71, which is the tax involved in this proceeding. The Commissioner computed the additional assessment by allocating 22.2% of the total net income derived from interstate and foreign commerce to California, that percentage correctly representing the proportion of the net income derived from business originating in this state. In arriving at this result, the Commissioner allocated to income from business done in this state that portion of petitioners' income from its transportation business done within and without the state which the amount of the business originating in this state bore to the total business done.

Petitioners concede that the percentage adopted by the Commissioner correctly represents that portion of their net income from interstate or foreign commerce derived from the transportation of passengers and freight originating in California. In a comprehensive opinion, the State Board of Equalization sustained the Commissioner, holding that the State has the power to impose a franchise tax upon domestic corporations measured in part by income derived from that proportion of their net income derived from business done in interstate or foreign commerce originating in this State, and that the tax act here involved provides for such a tax.

Petitioners contend that the Franchise Tax Act, properly construed, does not include in its tax base income derived from interstate or foreign commerce. In the event the act be construed to include such income, then petitioners con- [fol. 112] tend that the additional assessment is unconstitutional and void in that it imposes a tax on interstate and foreign commerce contrary to the commerce clause of the Federal Constitution; that it deprives petitioners of the equal protection of the laws and deprives them of their property without due process; that the assessment is also void for lack of uniformity in violation of section 11 of Art. 1 of the State Constitution, and that it also violates sec. 15 of Art. XII of the State Constitution in that it permits foreign corporations similar to petitioners to engage in business in this state on more favorable terms than domestic corporations. All of these contentions are without merit, as will hereinafter appear.

The first major contention of petitioners is that the Franchise Tax Act does not expressly include net income from interstate or foreign commerce and that the act cannot and should not be interpreted as imposing a tax measured by income derived from such business, even though such a tax were within the power of the state to impose. The problem thus presented is solely one of interpretation, turning solely upon the provisions of the act.

The act does not specifically provide that income from business done in interstate or foreign commerce originating in this state shall be included in the measure of the tax. Such specific provision is not necessary, however, if the language employed is broad enough to and actually does include such income, and if such income is not otherwise

excluded. It is our opinion that the provisions of the act include in the measure of the tax all income, however earned, unless such income is specifically excluded, and that since there is no provision specifically excluding the type of income here involved, it is necessarily included.

[fol. 113] Section 4 of the act, as it read in 1931, provides "Every financial, mercantile, manufacturing and business corporation doing business within the limits of this state, of the classes referred to in subdivision 2 (a) of section sixteen of article thirteen of the constitution of this state, shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income * * * at the rate of four per centum * * *" Under this section, considered alone, every corporation of the type classified that does business in this state would be required to pay a tax measured by its entire net income, regardless of source, but it is important to note that the tax is imposed only on those corporations referred to in sec. 2 (a), of section 16, Article XIII, of the Constitution. That section, as it read prior to the 1933 amendments, refers to those corporations doing business in this state which are subject to be taxed pursuant to subdivision (d) of section 14 of Art. XIII of the Constitution. Prior to the adoption of the Corporation franchise tax act here involved, it was held that foreign corporations engaged solely in interstate commerce were not subject to the tax imposed by section 14 (d). (People vs. Pacific Alaska Steamship Company, 182 Cal. 202.) Thus the classification found in section 4 of the act here involved, as above quoted, necessarily excludes from the tax foreign corporations doing business in this State but engaged solely in interstate commerce. This is quite important, because if sec. 4 should be interpreted to include such corporations, the act, as to such corporations, would be unconstitutional. The United States Supreme Court has consistently held that a state may not impose a franchise tax, whether measured by net income or otherwise, upon foreign corporations doing business within the state, if the foreign corporations' business is exclusively interstate in character. (Alpha Portland Cement Co. vs. Massachusetts, 268 U. S. 203; Anglo-Chilean Nitrate Sales [fol. 114] Co. vs. Alabama, 288 U. S. 218).

However, although sec. 4, by its classification, excludes from its provisions foreign corporations doing business in this State and engaged solely in interstate commerce, it includes within its terms foreign corporations engaged in both interstate and intrastate commerce, as well as domestic corporations also so engaged. If Sec. 4 were the only provision of the act on the subject, such corporations would be required to pay a franchise tax for the privilege of engaging in intrastate business in this State, measured by its entire net income, however acquired. However, the act contains other provisions which limit the operation of section 4, above quoted.

Section 5 of the act, as it read in 1931, defines the terms "doing business" as "any transaction or transactions in the course of its business by a corporation created under the laws of this state, or by a foreign corporation qualified to do or doing intrastate business in this state * * *" Section 10 of the act, as it read in 1931, provides: "If the entire business of the bank or corporation is done within this state, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this state, the tax shall be according to or measured by that portion thereof which is derived from business done within this state." The section then provides for various formulae whereby the portion of the net income attributable to business done within this state may be determined, and expressly provides that whatever formula is used it must be "fairly calculated to assign to the state the portion of net income reasonably attributable to the business done within this state and to avoid subjecting the taxpayer to double taxation." The formula adopted by the Commissioner in the present case is well calculated to accomplish the purpose provided in the portion of section 10 last quoted.

[fol. 115] We think that by section 4 of the act as limited by sections 5 and 10, as above quoted, the act was intended to and by its terms does impose on the corporations of the type mentioned, for the privilege of exercising their corporate franchises within this State, the tax therein provided, whether such corporation is a foreign or domestic corporation, and whether engaged in interstate or foreign commerce or not, so long as such corporation is doing some intrastate business as well. We are likewise of the opinion

that the act clearly, without ambiguity, imposes on foreign and domestic corporations of the classes mentioned, when they are engaged in both intrastate and interstate commerce, for the privilege of engaging in intrastate commerce, a franchise tax measured by or according to their net income, and that the act provides in such cases that income from interstate or foreign commerce shall be included in measuring the tax to the extent limited in the act.

Petitioners' contention that the words "derived from business done within this state," found in section 10, must be construed to mean business solely done in intrastate commerce, is untenable. When standing alone, such words may be capable of the interpretation contended for (Pacific Express Co. vs. Siebert, 142 U. S. 339), but when read with the rest of section 10 and with sections 4 and 5, they cannot be so interpreted without doing violence to the language used and without imposing limitations not therein contained. Section 10, in the interests of avoiding double taxation, does limit section 4 to the extent of excluding from the measure of the tax income from business done entirely outside the state, but reasonably and properly construed, there is nothing in the section which even by implication excludes from the measure of the tax imposed for the privilege of exercising the corporate franchise to do intrastate business, income from interstate or foreign commerce which is reasonably attributable to business done within this State.

[fol. 116] The above interpretation of the act brings us to the next major question presented, viz., Is the tax here involved, as interpreted above, in violation of the commerce clause and the equal protection and due process clauses of the federal constitution? The contentions made by petitioners on this point are not new. They have been made in many cases and have been completely answered by several decisions of the United States Supreme Court. It is well settled that any tax that is a direct burden on interstate commerce is unconstitutional. Thus, as already stated, a franchise tax measured by net income cannot be imposed on a foreign corporation engaged solely in interstate commerce (Alpha Portland Cement Co. vs. Massachusetts, supra), because such tax attempts to directly burden such commerce. Likewise, a gross receipts tax on a foreign corporation engaged in both interstate and intrastate commerce is unconsti-

tutional as a direct burden on interstate commerce. (United States Glue Company vs. Oak Creek, 247 U. S. 321.) On the other hand, it has been held that a tax upon net income of a foreign or domestic corporation engaged in both interstate and intrastate commerce, where the tax is imposed upon all income earned within the State, including income derived from transactions in interstate or foreign commerce, does not amount to burdening interstate or foreign commerce, and is valid. (United States Glue Company vs. Oak Creek, supra; Peck & Co. vs. Lowe, 247 U. S. 165.) In the Glue Company case, supra, the court pointed out that a tax that affects only indirectly the profits or returns from interstate commerce is valid, and that the franchise of a corporation is property which can be taxed, and then stated: (p. 328.)

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a [fol. 117] direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax cannot be heavy unless the profits are large. Such a tax, when imposed upon net income from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the States are not exempted by the Federal Constitution because they happen to be engaged in commerce among the states."

Petitioners concede that a state, under the above authorities, can impose a net income tax and impose the tax on

income from interstate commerce, but contend that the principles applicable to a state's power to impose franchise taxes measured by net income are entirely different from the principles applicable to a state's power to impose taxes upon net income. There are some differences between the two situations, it is true, but such differences do not affect the situation here presented. When a foreign corporation comes into this state and does some intrastate business, as well as interstate business originating here, it cannot be taxed for the privilege of engaging in interstate commerce, but it may be taxed for the privilege of engaging in intrastate commerce. In fixing that tax, [fol. 118] the state may require the corporation to pay for that privilege a tax measured by its net income attributable to business done in this state, regardless of whether the income is derived from intrastate business or from business done in interstate or foreign commerce. The cases of Underwood Typewriter Co. vs. Chamberlain, 254 U. S. 113, and Bass, Ratcliff & Gretton Ltd. vs. State Tax Commission, 266 U. S. 271, squarely support this conclusion. The following language from the Underwood case, supra, p. 120, is pertinent:

"A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the state. Postal Telegraph Cable Co. v. Adams, 155 U. S. 688, 695, 15 Sup. Ct. 268, 39 L. Ed. 311. This tax is based upon the net profits earned within the state. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce, is settled. U. S. Glue Co. v. Oak Creek, 247 U. S. 321, 38 Sup. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E. 748; Shaffer v. Carter, 252 U. S. 37, 57, 40 Sup. Ct. 221, 64 L. Ed. 445; compare Peck & Co. v. Lowe, 247 U. S. 165, 38 Sup. Ct. 432, 62 L. Ed. 1049. Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause."

Since, under the Federal Constitution, the state may impose a franchise tax, measured by income from business done within the state derived from interstate or intrastate commerce, upon foreign corporations doing some intrastate

business, it likewise has at least equal powers as to domestic corporations.

The above analysis completely disposes of petitioners' arguments on the constitutional point under discussion and also fully disposes of petitioners' argument that under the act foreign corporations similar to petitioners (foreign cor- [fol. 119] porations doing some intrastate and some interstate business) are permitted to transact business here on more favorable terms than petitioners. As we have seen, the act makes no distinction, but treats both classes alike. In this connection, it is worthy of mention that the state, so far as domestic corporations such as petitioners are concerned, has seen fit to impose a tax more limited in extent than it could have levied. Unquestionably the state has the power to tax the entire net income of a domestic corporation, from whatever source derived (with certain possible exceptions not here involved, see Lynch vs. People, 55 Sup. Ct. Rep. 16), including its total income from interstate commerce, whether originating in this state or not. (Lawrence vs. State Tax Commission, 286 U. S. 276; Cream of Wheat Co. vs. Grand Forks, 253 U. S. 325; see also Schwab vs. Richardson, 263 U. S. 88.) California, however, in the interests of imposing on domestic corporations engaged in both interstate and intrastate commerce the same tax that is imposed on foreign corporations similarly situated, has limited the tax to that portion of the income derived from interstate commerce attributable to business done in this state. In view of this, petitioners have no just cause for complaint.

We do not find it necessary to discuss the many other points raised by petitioners, nor the many cases cited by them. The above analysis is a complete answer to all of their contentions. We emphasize the fact that the act here involved imposes a tax on a corporation "for the privilege of exercising its corporate franchises within this state." Such a tax, under the authorities already cited, although measured in part by net income from interstate or foreign commerce originating here, does not compel a company to pay for the privilege in order to engage in interstate or foreign commerce.

The order of the respondent Board is affirmed.

[fol. 120] IN SUPREME COURT OF CALIFORNIA

S. F. 15137

MATSON NAVIGATION CO.

vs.

STATE BOARD OF EQUALIZATION

JUDGMENT

BY THE COURT:

The order of respondent Board is affirmed.

[fol. 121] [File endorsement omitted]

[fol. 122] IN SUPREME COURT OF CALIFORNIA

[Title omitted]

PETITION FOR REHEARING—Filed April 16, 1935

To the Honorable William H. Waste, Chief Justice of the Supreme Court of the State of California, and to the Associate Justices of said Court:

The petitioners in the above-entitled action respectfully petition for a rehearing thereof upon the following grounds:

[fol. 123] (1) The Court in its opinion erroneously construed the Bank and Corporation Franchise Tax Act to impose a tax on corporations for the privilege of exercising their corporate franchises within the State, measured by net income from interstate and foreign commerce. In so doing, the Court disregarded the plain language of the Act and all applicable rules of construction.

(2) The Court in its opinion construed the Act to impose a tax for the privilege of doing interstate and foreign business, and the Act, as so construed, and the assessment of the Franchise Tax Commissioner violate the constitutional rights and immunities of the taxpayer guaranteed by the Constitution of the United States.

(3) The Court in its opinion construed the act to measure the tax imposed thereby by income from interstate and foreign business and, so construed, the Act in effect taxes the privilege of doing interstate and foreign business, thereby violating the constitutional rights and immunities of the taxpayer guaranteed by the Constitution of the United States.

(4) The Act, as construed by the Court, and the assessment of the Commissioner deny the petitioners the equal protection of the laws, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States. [fol. 124] The Act, as construed by the Court, and the assessment violate the provisions of Section 8 of Article I of the Constitution of the United States. The Act, as construed by the Court, and the assessment deprive the petitioners of their property, without due process of law and without just or any compensation, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

Before proceeding with a discussion of the respects in which we are convinced the Court erred in its opinion, we wish to point out that no decision, either of the United States Supreme Court, or of any other court, has ever upheld a state tax upon the privilege of doing business measured in part by net income from interstate or foreign commerce. The opinion stands alone and is a departure from established principles of constitutional law.

The Opinion on File Herein Disregards the Literal Meaning of the Language of the Bank and Corporation Franchise Tax Act and All Applicable Rules of Construction in Holding That Net Income from Interstate Business is Included in the Measure of the Tax

Whether or not the Act includes net income from inter- [fol. 125] state business in the measure of the tax depends entirely upon the meaning of the phrase "business done within this state" in Section 10 of the Act. That section provides that if the entire business of the corporation is not done within this state, the tax shall be measured by that portion of the corporation's net income which is derived from "business done within this state." If the phrase "business done within this state" does not include inter-

state business within its meaning, then net income from interstate business is not included in the measure of the tax.

The two phrases "business done within this state" and "intrastate business" have the same meaning. "Within" means, literally, "inside of" (Funk and Wagnall's Standard Dictionary; Webster's Universal Dictionary; The Oxford Dictionary), and the prefix "intra" means "within" (ibid.). The phrase "business done within this state" therefore means precisely the same thing as the phrase "intrastate business," and the cases construing the former are uniform in so holding (Pacific Express Co. v. Seibert, 142 U. S. 339; Converse v. Northern Pacific Railway Co., 2 F. (2d) 959).

We respectfully submit that the Court's conclusion that the measure of the tax includes net income from any and all business which is not "done entirely outside the state" is [fol. 126] unjustified by anything in the Act. The Act does not purport to include in the measure income from any and all business not "done entirely outside of the state"; it purports to include only income "from business done within this state," and, as held by the Supreme Court of the United States:

> "'Business done within this state' cannot be made to mean business done between that state and other states."
>
> Pacific Express Co. v. Seibert, supra.

We cannot understand the suggestion that to give the phrase "business done within this state" its literal meaning would do violence to the language of preceding provisions of the Act. We are unable to find, and the opinion points out, no provision of the Act with which a literal interpretation conflicts. Section 10 contains the only provision which purports to apply where the corporation does not do all of its business within this state, and we cannot see how to give that provision its literal meaning can do violence to other provisions which do not purport to apply. There is nothing in the rest of the Act to indicate that the Legislature did not mean what it said in Section 10. As pointed out by the United States Supreme Court, the violence is done when "business done within this state" is made to mean business done between this state and others. [fol. 127] We respectfully submit that if the opinion should become final, it would overrule a long line of prior

decisions of this Court and depart from what is universally regarded as settled law, for the opinion, far from construing the Act strictly against the state, construes it strictly against the taxpayers. The question is not as suggested in the opinion, whether the Act excludes from the measure of the tax income from interstate or foreign business. The question is whether the Act includes that income. As we have pointed out, Section 10 contains the only provision which purports to apply where the corporation does not do all of its business within this state, and that provision purports to include in the measure of the tax only net income from "business done within this state," or, interpreted literally "intrastate business." To give the phrase "business done within this state" a broader meaning, is to absolutely disregard the settled rule that a tax statute is to be construed strictly against the state.

We respectfully submit that the opinion on file herein errs in construing the Act to include income from interstate business in the measure of the tax, and that the violence which this error does to settled principles requires that it be rectified. If "business done within this state" includes interstate business within its meaning, then the United [fol. 128] States Supreme Court and the dictionaries are wrong. To so construe the phrase violates every applicable principle of statutory construction.

The Opinion on File Fails to Notice That, as Construed by It, the Act by Its Terms Imposes a Tax for the Privilege of Doing Interstate Business

A state cannot tax a corporation for the privilege of doing interstate business. If, by the terms of a statute, a tax is imposed for the privilege of doing interstate as well as intrastate business, that tax is unconstitutional (Leloup v. Port of Mobile, 127 U. S. 640). It follows that if the tax is for the privilege of doing interstate as well as intrastate business, it is unconstitutional at least to the extent that it is for the privilege of doing interstate business.

The Court in its opinion construed the phrase "business done within this state" to include not only intrastate business, but also, interstate and foreign business. The phrase "within this state" upon which the question of construction hinges, is used in the act to define both the subject and the measure of the tax. It is thus apparent that the Court has

construed the Act to expressly impose a tax upon the privilege of doing interstate and foreign business.

[fol. 129] As so construed, the Act is clearly unconstitutional (Leloup v. Port of Mobile, supra). The Court itself has recognized this in its discussion of Section 4. The Court expressly states that if it were not for the limitation contained in Section 4 to corporations taxable under the old constitutional provision, the Act would purport to tax foreign corporations engaged exclusively in interstate and foreign commerce, and would be unconstitutional. Aside from that limitation, therefore, the Act purports to tax the privilege of doing interstate and foreign as well as intrastate business.

It follows inevitably from this construction of the Act that it is, in part at least, unconstitutional because the privilege of doing interstate and foreign business is a subject of the tax. Leloup v. Port of Mobile, supra, governs the case at bar. In that case the Port of Mobile had imposed a flat tax of $225.00 upon a telegraph company "for the privilege of doing the business in which the telegraph company was engaged." The taxpayer was doing interstate as well as intrastate business and the tax therefore was held invalid because not limited by the wording of the Act to the privilege of doing intrastate business.

We respectfully submit that the foregoing objection is fatal. The respondent, in its brief, made no attempt to [fol. 130] meet the objection and it went unnoticed in the opinion on file herein. A rehearing is necessary to enable this Honorable Court to give it consideration.

The Opinion on File Herein Ignores a Principle Established by the United States Supreme Court and Misconstrues the Decisions of That Court in Holding That the Act as Construed in the Opinion Does Not in Effect Tax the Privilege of Doing Interstate Business

It is true that a state may tax the privilege of doing intrastate business. But it cannot, under the guise of a tax upon that privilege, levy a tax which is in effect upon the privilege of doing interstate and foreign business as well. The opinion construes the act to include income from interstate and foreign business in the measure of the tax. It is obvious that income from interstate and foreign business, while it is a fair measure of the value of the privilege of

doing that business, has no relation to the value of the privilege of doing intrastate business. Any attempt to include that income in the measure of the tax is an attempt to tax the privilege of doing interstate and foreign business.

The above reasoning has been employed time and again by the Supreme Court of the United States, and wherever it has been applicable the tax has been held bad. Thus in [fol. 131] Air-Way Electric Appliance Corp. v. Day, 266 U. S. 71, the Court said of a tax similar to the one imposed by the California Act:

"Without holding that such a charge must be measured by the value of the privilege for which it is imposed, it may be said that some relation to such value is a reasonable requirement."

The same principle was applied in Sprout v. South Bend, 277 U. S. 163, where the Court declared:

"A state may, by appropriate legislation require payment of an occupation tax from one engaged in both intrastate and interstate commerce * * * but in order that the fee or tax shall be valid it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; * * *."

Likewise, in Alpha Portland Cement Co. v. Massachusetts, 246 U. S. 134, the Court held:

"* * * The determination of real value with fair accuracy is essential. Many methods adapted to that end have been accepted, but this does not tend to support an excise laid upon a foreign corporation on account of interstate transactions."

[fol. 132] The foregoing decisions of the United States Supreme Court have never been overruled or criticized. The principle which they enunciate and apply is squarely applicable to the case at bar and compels the conclusion that the tax is invalid in so far as it is measured by net income from interstate commerce.

None of the cases cited by the respondent in its brief or by the Court in its opinion have the least tendency to uphold the validity of the tax under consideration. It is quite true, as held in United States Glue Co. v. Town of

Oak Creek, 247 U. S. 321, that a state may tax net income from interstate commerce. It is equally true, however, that a state cannot tax the privilege of doing interstate and foreign business, either directly or in the guise of a tax upon the privilege of doing intrastate business. We are concerned in the case at bar with a privilege tax, not an income tax. If this Court is right in its construction of the Act, then the Legislature, while purporting to tax the privilege of doing intrastate business, has attempted to get at the value of the privilege of doing interstate and foreign business by including in the measure of the tax income therefrom, which bears no relation to the value of the privilege of doing intrastate business. Under the well settled principle to which we have pointed, the tax therefore is invalid. [fol. 133] Peck & Co. v. Lowe, 247 U. S. 165, involved the validity of the federal income tax as imposed upon income from the export trade. It is disposed of by our remarks about United States Glue Co. v. Oak Creek, as also is Lawrence v. State Tax Commission, 286 U. S. 276, involving a state income tax upon the income of an individual earned outside of the state.

Underwood Typewriter Company v. Chamberlain, 254 U. S. 113, and Bass Ratcliff & Gretton v. Tax Commission, 266 U. S. 271, each involved a privilege tax measured by net income earned in the state. In each case the taxpayer objected that the formula used by the state to determine the amount of net income earned in the state, operated to include income actually earned outside of the state. In each case it was held that the formula was reasonably calculated to attribute to the state only the net income earned therein. In neither case was any part of the income included in the measure of the tax derived from interstate or foreign business.

Cream of Wheat Co. v. Grand Forks, 253 U. S. 325, involved a tax upon a domestic corporation measured by the value of its intangible property. The taxpayers argued that the tax was invalid because in effect it was upon property located outside of the state. The Supreme Court properly held that intangible property is located at the domicile [fol. 134] of the owner, which in the case of a corporation is the state of incorporation. The property used to measure the tax, therefore, was not located outside of the state.

In Schwab v. Richardson, 263 U. S. 88, this state had

taxed a domestic corporation for the privilege of corporate existence and had measured the tax by its property wherever located. Property wherever located and however used of course bears some relation to, and is an indicia of, the value of the privilege of corporate existence.

The foregoing cases are all that are cited in the opinion on file upon the point under consideration. Not one of them is inconsistent with the principle enunciated and applied in Air-Way Electric Appliance Corp. v. Day, Sprout v. South Bend, and Alpha Portland Cement Co. v. Massachusetts, and that principle is squarely applicable to the case at bar. Income from interstate and foreign business, or property used therein, may be included in the measure of a privilege tax when, but only when, it bears some reasonable relation to the value of the particular privilege taxed. The Supreme Court has never departed from this principle, and it remains the law.

Respectfully submitted, Brobeck, Phleger & Harrison, Attorneys for Petitioner.

[fol. 135] Receipt of a copy of the within is hereby admitted this 16 day of April, 1935.

U. S. Webb, Atty. General, Attorney for Respondents.

[fol. 136] IN SUPREME COURT OF CALIFORNIA

In Bank

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—Filed April 25, 1935

BY THE COURT:

The petition for a rehearing herein is denied.
Dated: April 25, 1935.

Waste, Chief Justice.

[File endorsement omitted.]

[fols. 137 & 138] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 139] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF THE PARTS OF THE RECORD TO BE PRINTED—Filed Aug. 6, 1935.

Come now the appellants in the above entitled cause and state that the points upon which they intend to rely in this Court in this case are as follows:

Point No. 1. The decision of the Board of Equalization violates the Constitution of the United States.

Point No. 2. The State Bank and Corporation Franchise Tax Act of California (California Stats. 1929, Chapter 13, [fol. 140] as amended, California Stats. 1929, Chapter 781), is repugnant to the Constitution of the United States.

Point No. 3. Said act taxes the privilege of doing interstate and foreign business, inasmuch as it purports to impose a tax on the privilege of doing business measured in part by net income derived from interstate and foreign business.

Point No. 4. Said act violates Section 8 of Article I of the Constitution of the United States, inasmuch as it purports to impose a tax on the privilege of doing business in interstate and foreign commerce.

Point No. 5. Said act denies to petitioners the equal protection of the laws guaranteed by Section 1 of the Fourteenth Amendment to the Constitution of the United States, inasmuch as it purports to impose a tax on the privilege of doing interstate and foreign commerce.

Point No. 6. Said act deprives petitioners of their property without due process of law and without just or any compensation, inasmuch as it purports to impose a tax on the privilege of doing interstate and foreign commerce.

Point No. 7. Said act burdens interstate and foreign commerce in violation of Section 8 of Article I of the Constitution of the United States, inasmuch as it purports to [fol. 141] impose a tax on the privilege of doing business measured in part by net income from interstate and foreign business.

Point No. 8. Said act denies to petitioners the equal protection of the laws, inasmuch as it purports to impose a tax

for the privilege of doing business measured in part by the net income derived by petitioners from interstate and foreign business.

Point No. 9. Said act deprives the petitioners of their property without due process of law and without just or any compensation, inasmuch as it purports to impose a tax on the privilege of doing business measured in part by net income derived by petitioners from interstate and foreign business.

Point No. 10. Said act burdens interstate and foreign commerce in violation of Section 8 of Article I of the Constitution of the United States, inasmuch as it purports to impose a tax on the privilege of doing business within the state measured in part by net income derived from interstate and foreign business carried on therein.

Point No. 11. Said act denies to petitioners the equal protection of the laws, inasmuch as it purports to impose a tax for the privilege of doing business within the state measured, in part, by net income derived by the taxpayer from interstate and foreign business carried on therein.

[fol. 142] Point No. 12. Said act deprives the petitioners of their property without due process of law and without just or any compensation, inasmuch as it purports to impose a tax on the privilege of doing business within the State, measured, in part, by income derived from interstate and foreign business carried on therein.

Point No. 13. Said act is invalid when applied to interstate or foreign transportation business.

Point No. 14. Said act is invalid when applied to include, within the measure thereof, income from interstate or foreign transportation business.

Point No. 15. Said act denies to petitioners the equal protection of the laws, because, as a condition of the right to do intrastate business, it purports to impose a tax measured in part by income from interstate and foreign business carried on within the boundaries of the state.

The decision of the Board of Equalization hereinbefore referred to is the decision that was upheld by the judg-

ment of the Supreme Court of the State of California, from which this appeal has been taken and allowed.

The appellants further state that the whole of the record, as filed, is necessary for the consideration of the case, and that all parts of the record, as filed, are deemed necessary [fol. 143] to be printed.

Dated: July 30th, 1935.

Herman Phleger, Maurice E. Harrison, Howard J. Linn, Gregory A. Harrison, Attorneys for Petitioners.

[fol. 144] Due service and receipt of a copy of the within Statement of Points to be Relied Upon and Designation of the Parts of the Record to be Printed is hereby acknowledged this 30th day of July 1935.

U. S. Webb, Attorney General of the State of California by H. H. Linney, Deputy Attorney General.

[fol. 145] [File endorsement omitted]

Endorsed on cover: File No. 39,900. California, Supreme Court. Term No. 346. Matson Navigation Company, The Oceanic Steamship Company and Matson Terminals, Inc., Appellants, vs. State Board of Equalization of the State of California, et al. Filed August 6, 1935. Term No. 346 O. T. 1935.

FILE COPY

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ELMORE J
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 346

MATSON NAVIGATION COMPANY, THE OCEANIC STEAMSHIP COMPANY, AND MATSON TERMINALS, INC.,

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT AS TO JURISDICTION.

HERMAN PHLEGER,
MAURICE E. HARRISON,
HOWARD J. FINN,
GREGORY A. HARRISON,
Counsel for Appellants.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 346

MATSON NAVIGATION COMPANY, A CORPORATION, THE OCEANIC STEAMSHIP COMPANY, A CORPORATION, AND MATSON TERMINALS, INC., A CORPORATION,
Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, H. G. CATTELL AND RAY L. RILEY, THE MEMBERS OF SAID STATE BOARD OF EQUALIZATION, AND CHARLES J. McCOLGAN, FRANCHISE TAX COMMISSIONER OF THE STATE OF CALIFORNIA.

STATEMENT AS TO JURISDICTION ON APPEAL.

MAY IT PLEASE THE COURT:

The appellants, in support of the jurisdiction of this Court to review the above-entitled cause on appeal, respectfully show:

I. Statutory Provisions Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stats. 936, 937 (United States Code, Title 28, Sec. 344),

provides that Section 237 of the Judicial Code is amended to read in part as follows:

> "* * * A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The Act of January 31, 1928, Chapter 14, 45 Stats. 54, as amended by the Act of April 26, 1928, Chapter 440, 45 Stats. 466 (United States Code, Title 28, Sections 861a and 861b), provides:

> "BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal.
>
> "Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate shall be applicable to the appeal which the preceding section substitutes for a writ of error."

II. Date of Decree and Date of Application for Appeal.

The judgment sought to be reviewed was rendered on the 27th day of March, 1935. A petition for rehearing of said cause by the Supreme Court of the State of California was duly filed on the 16th day of April, 1935, and an order denying such petition was rendered on the 25th day of April, 1935. The application for appeal was presented on the 17th day of June, 1935.

III. Statute of the State of California, the Validity of Which is Involved.

Said cause involves the validity of the Bank & Corporation Franchise Tax Act of the State of California (California Statutes 1929, page 19, as amended by California Statutes 1929, page 1555).

With certain exceptions the Act (Sec. 4) imposes upon every financial, mercantile, manufacturing and business corporation doing business within the State, for the privilege of exercising its corporate franchises therein, a tax measured by its net income at the rate of 4% of such net income for the next preceding fiscal or calendar year.

"Doing business" is defined (Section 5) as meaning any transaction or transactions in the course of its business by a corporation created under the laws of this state or by a foreign corporation qualified to do or doing intrastate business in this state.

In Section 10, the Act provides that if the entire business of a corporation is done within the State the tax shall be measured by its entire net income; and if the entire business of the corporation is not done within the State, the tax shall be measured by that portion thereof which is derived from business done within the State. It further provides that the portion of the net income of a corporation derived

from business done within the State shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacture, payroll, value and situs of tangible property or by reference to these or other factors or by such other method of allocation as is fairly calculated to assign to the State the portion of net income reasonably attributable to business done within the State. The Supreme Court of the State of California in the decision from which this appeal was taken, interpreted the Act to impose a tax upon every corporation carrying on intrastate business and to include within the measure of that tax income derived from interstate and foreign business.

Other provisions of the Act provide for the determination of the taxpayer's annual accounting period (Section 12) the manner and form of reporting income (Section 13), and the filing of consolidated returns by affiliated companies. The Act provides for examination of the taxpayer's return by the Commissioner and the determination therefrom of the correct amount of the tax. Provision is made for filing of a written protest by the taxpayer against the determination of the Franchise Tax Commissioner and for hearing thereon.

An appeal from the action of the Franchise Tax Commissioner by the taxpayer to the State Board of Equalization is provided for (Section 25).

Section 30, as amended, (Calif. Statutes 1933, page 703) gives to the taxpayer the right to apply to the Supreme Court of the State of California for a writ of review from the decision or order of the State Board of Equalization and empowers the Supreme Court of the State of California to enter judgment either affirming or setting aside the order or decision of the Board.

IV. Nature of the Case.

The appellants, The Oceanic Steamship Company and Matson Navigation Company, are corporations formed under the laws of the State of California. They are engaged in certain intrastate business activities. In addition to its intrastate business Matson Navigation Company engages in the steamship business, transporting passengers and freight exclusively in interstate commerce between California and Hawaii. The Oceanic Steamship Company conducts a similar business, transporting passengers and freight solely in interstate and foreign commerce. Neither of these corporations engages in any intrastate transportation activities.

Appellants, by a consolidated return, reported to the Franchise Tax Commissioner all of their net income from intrastate activities for the taxable year ending December 30, 1930, and paid the tax computed thereon. In computing the tax, appellants omitted all net income from their transportation business, which was wholly foreign and interstate in character. The Franchise Tax Commissioner assessed an additional tax of $19,637.71 upon appellants. This amount was fixed by applying the statutory rate (4%) to a portion of the net income of the taxpayers derived from their interstate and foreign transportation business.

The appellants protested the additional tax and after the Franchise Tax Commissioner had ruled adversely upon that protest, an appeal was duly taken to the State Board of Equalization.

The State Board of Equalization affirmed the order of the Franchise Tax Commissioner and the appellants made application to the Supreme Court of the State of California for a writ of review. The Supreme Court of the State of California reviewed the decision of the State Board of

Equalization and entered its judgment affirming the decision of the Board. A petition for rehearing by the Supreme Court of the State of California was denied.

The plaintiffs contended before the Franchise Tax Commissioner, before the State Board of Equalization, and before the Supreme Court of the State of California, (a) that the act, properly construed, did not include net income from interstate or foreign business in the measure of the tax which it imposed; and (b) that the act, if construed to include in the measure of the tax any income of appellants from their interstate and foreign business, violated the Constitution of the United States, in that it denied to appellants the equal protection of the laws, deprived appellants of their property without due process of law and without just or any compensation and burdened interstate and foreign commerce. The Supreme Court of the State of California, upon rendering its judgment against the Appellants, held that the Act imposes a tax upon each corporation engaging in intrastate business, and that the tax so imposed is measured in part by net income from its interstate and foreign business. The Supreme Court of the State of California further held by said judgment that the Act, so construed, is not repugnant to the Constitution of the United States.

Said judgment of the Supreme Court of the State of California is a final judgment in said cause in the highest court of the State of California in which a decision in said cause could be had. In said cause the validity of the Bank and Corporation Franchise Tax Act of the State of California was disputed on the ground that it was repugnant to the Constitution of the United States and the decision of the Supreme Court of the State of California upheld the validity of said Act.

V. Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

Kansas City Southern R. Co. v. *Road Improvement District No.* 3, 266 U. S. 379, 385, 386;
Saltonstall v. *Saltonstall*, 276 U. S. 260;
Pacific Co., Ltd., v. *Johnson*, 285 U. S. 480;
Miedreich v. *Lauenstein*, 232 U. S. 236.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of the statutory provisions hereinbefore specified.

Respectfully submitted,

HERMAN PHLEGER,
MAURICE E. HARRISON,
HOWARD J. FINN,
GREGORY A. HARRISON,
Attorneys for Appellants.

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In the Supreme Court
OF THE
United States

FILED
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CHARLES

OCTOBER TERM, 1935

No. 346

MATSON NAVIGATION COMPANY (a corporation), THE OCEANIC STEAMSHIP COMPANY (a corporation), and MATSON TERMINALS, INC. (a corporation),

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, H. G. CATTELL and RAY L. RILEY, the Members of Said State Board of Equalization, and CHARLES J. MCCOLGAN, Franchise Tax Commissioner of the State of California,

Appellees.

BRIEF FOR APPELLANTS.

HERMAN PHLEGER,
MAURICE E. HARRISON,
HOWARD J. FINN,
GREGORY A. HARRISON,
Crocker Building, San Francisco, California,
Counsel for Appellants.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1935

No. 346

MATSON NAVIGATION COMPANY (a corporation), THE OCEANIC STEAMSHIP COMPANY (a corporation), and MATSON TERMINALS, INC. (a corporation),

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, H. G. CATTELL and RAY L. RILEY, the Members of Said State Board of Equalization, and CHARLES J. McCOLGAN, Franchise Tax Commissioner of the State of California,

Appellees.

BRIEF FOR APPELLANTS.

This is an appeal from the judgment of the Supreme Court of the State of California affirming an order of

the appellee State Board of Equalization, approving an assessment levied against the appellants by the Franchise Tax Commissioner of the State of California. Appellants have heretofore filed the Statement as to jurisdiction on appeal required by Rule 12.

OPINION OF THE COURT BELOW.

The opinion of the court below is reported, *Matson Navigation Company, et al. v. State Board of Equalization, et al.*, 43 Pac. (2d) 805, 89 Cal. Dec. 434, 3 Cal. (2d) 1*, and is included in the record herein at pages 62 to 70.

The opinion of the State Board of Equalization is reported in Corporation Tax Service for California, published by the Corporation Trust Company, page 252, paragraph 1517, and is included in the record herein at pages 46 to 59.

STATEMENT OF THE CASE.

This appeal involves the validity of an assessment levied against appellants by the Franchise Tax Commissioner, and thereafter successively affirmed by the State Board of Equalization and the Supreme Court of California, under the California Bank and Corporation Franchise Tax Act (Statutes of California, 1929, page 19).

---

*The official report, 3 Cal. (2d) had not yet been published when this brief was written, but we are informed by the official reporter that the page number stated above is correct.

Provisions of Constitution of California.

This act was adopted pursuant to the provisions of Article XIII, Section 16 of the Constitution of California, adopted November 6, 1928, and providing in part as follows:

> "Notwithstanding any other provision of this Constitution: * * *
>
> "2. (*a*) All financial, mercantile, manufacturing and business corporations doing business within the limits of this state, subject to be taxed pursuant to subdivision (*d*) of section 14 of this article, in lieu of the tax thereby provided for, shall annually pay to the state for the privilege of exercising their corporate franchises within this state a tax according to or measured by their net income. The amount of such state tax shall be equivalent to four per cent of their net income. Such tax shall be subject to offset, in a manner to be prescribed by law, in the amount of personal property taxes paid by such corporations to the state or political subdivisions thereof, but the offset shall not exceed ninety per cent of such state tax. In any event, each such corporation shall pay an annual minimum tax to the state, not subject to offset, of twenty-five dollars.
>
> "(*b*) The legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof, may provide by law for the taxation by any other method authorized in this Constitution of the corporations, or the franchises, subject to be taxed pursuant to subdivision (*a*) of paragraph 2 of this section or subdivision (*d*) of section 14 of this article."

The full text of this section is set forth as an appendix to this brief.

Article XIII, Section 14, subdivision (d) of the Constitution of California, referred to in the foregoing section, reads as follows:

> "All franchises, other than those expressly provided for in this section, shall be assessed at their actual cash value, in the manner to be provided by law, and shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the state."

The Bank and Corporation Franchise Tax Act.

The California Bank and Corporation Franchise Tax Act, as it existed at the time of the imposition of the tax in dispute, contained the following provisions:

Sections 1, 2 and 3 imposed upon banks and national banking associations an annual tax according to or measured by their net income, to be computed at the rate of four per centum upon their net income for the next preceding year; and provided that in the case of such banks and banking associations, the tax should be in lieu of all other taxes and licenses except taxes on their real property and should be subject to offsets of ten per cent of their real property taxes. These sections have no application to appellants.

Section 4 provides as follows:

> "Every financial, mercantile, manufacturing and business corporation doing business within the limits of this state, of the classes referred to in subdivision 2(*a*) of Section 16 of article thirteen of the constitution of this state, shall annually pay to the state, for the privilege of exercising its corporate franchises within this state,

a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year.

"Each such corporation shall be entitled to an offset against said franchise tax, in the manner hereinafter provided, in the amount of taxes paid upon its real and personal property to any county, city and county, city, town, or other political subdivision of the state, but the total offset shall not exceed seventy-five per centum of the said franchise tax, and in no case shall the taxpayer be entitled to offset more than ten per centum of its said real property taxes.

"In any event, each such corporation shall pay annually to the state, for the said privilege, a minimum tax of twenty-five dollars.

"Taxes under this section and under sections 1 and 2 of this act shall accrue on the first day after the close of the 'taxable year,' as defined in section 11 hereof."

Section 5 contains the following definitions:

"The term 'corporation,' as herein used, shall include every financial corporation, other than a bank or banking association, and every mercantile, manufacturing and business corporation of the classes referred to in subdivision one (*c*) of section 5219 of the Revised Statutes of the United States.

"The term 'bank,' as hereinafter used, shall include national banking associations.

"The term 'doing business,' as herein used, means any transaction or transactions in the

course of its business by a corporation created under the laws of this state, or by a foreign corporation qualified to do or doing intrastate business in this state."

Section 6 defines "gross income" as follows:

"The term 'gross income,' as herein used, includes gains, profits and income derived from the business, of whatever kind and in whatever form paid; gains, profits or income from dealings in real or personal property; gains, profits or income received as compensation for services, as interest, rents, commissions, brokerage or other fees, or otherwise received in carrying on such business; all interest received from federal, state, municipal or other bonds, and, except as hereinafter otherwise provided, all dividends received on stocks."

Section 7 provides that "net income", as used in the act, means the gross income less the deductions allowed.

Section 8 defines the allowable deductions as including expenses, interest, taxes, losses and certain other items.

Section 9 denies the right to deduct for improvements or betterments and certain other outlays.

Section 10 of the act reads as follows:

"If the entire business of the bank or corporation is done within this state, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this state, the tax shall be according to or measured by that portion thereof which is derived from business

done within this state. The portion of net income derived from business done within this state shall be determined by an allocation upon the basis of sales, purchases, expenses of manufacture, payroll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the state the portion of net income reasonably attributable to the business done within this state and to avoid subjecting the taxpayer to double taxation.

"If the commissioner reallocates net income upon his examination of any return, he shall, upon the written request of the taxpayer, disclose to him the basis upon which his reallocation has been made."

Section 11 defines the terms "taxable year" and "fiscal year", and Section 12 provides for the adoption of the taxpayer's annual accounting period.

Section 13 provides for an annual corporate return and Section 14 for a consolidated return by affiliated corporations.

Sections 15 to 24, inclusive, contain various provisions with respect to the returns, the ascertainment of profits or losses in specific cases and the payment of the tax.

Section 25 provides that the Franchise Tax Commissioner may determine the amount of any proposed additional tax and notify the taxpayer, who may thereupon file a written protest. In the event the protest is denied by the Commissioner, an appeal may be taken to the State Board of Equalization.

Section 26, dealing with offsets, Section 27, with refunds, and Section 28 with fraud and evasion, are not here involved.

Section 29 declares that the taxes levied under the act shall be a lien on all property of the taxpayer.

Section 30 allows recovery by the taxpayer of taxes paid under protest, and Section 31 provides for a civil action by the state to collect the tax from the general corporate assets.

Section 32 provides that if the tax is not paid within twelve months after delinquency, "the corporate powers, rights and privileges of a delinquent taxpayer, if it be a domestic corporation, shall be suspended, and if the delinquent taxpayer be a foreign corporation, it shall thereupon forfeit its right to do intrastate business in this state". This section further provides:

> "Any person who attempts or purports to exercise any of the rights, privileges or powers of any such domestic corporation, or who transacts or attempts to transact any intrastate business in this state in behalf of any such foreign corporation shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than two hundred fifty dollars and not exceeding one thousand dollars, or by imprisonment in the county jail not less than fifty days or more than five hundred days, or by both such fine and imprisonment. * * * Every contract made in violation of this section is hereby declared to be voidable."

The remaining provisions of the act are not material to the questions here involved. A copy of the complete text of the act is set forth in the appendix to this brief.

By amendment to the statute in 1933, it was provided that the decision of the State Board of Equalization might be reviewed by the Supreme Court of California on writ of certiorari. The provisions with respect to the appeal to the State Board of Equalization from the Franchise Tax Commissioner, which were contained in Section 25 of the act, were amended to read as follows:

> "The appeal must be addressed and mailed to the State Board of Equalization at Sacramento, and a copy of the appeal addressed and mailed at the same time to the commissioner at Sacramento. Said board shall hear and determine the same and thereafter shall forthwith notify the taxpayer and the commissioner of its determination, and the reasons therefor, which shall be final upon the expiration of sixty days from the time of such determination, unless within such sixty-day period the commissioner shall apply to the Supreme Court of the State for a writ of certiorari or review for the purpose of having the lawfulness of the decision of the State Board of Equalization inquired into and determined." (Statutes of California, 1933, page 699.)

The review of the ruling of the State Board of Equalization by the Supreme Court was provided for by amendment to Section 30, reading as follows:

> "Within sixty days after the determination of the State Board of Equalization of any appeal

from the action of the commissioner either the commissioner or the appellant may apply to the Supreme Court of the State for a writ of certiorari or review for the purpose of having the lawfulness of the decision or order of the board inquired into and determined. Such writ shall be made returnable not later than thirty days after the date of the issuance thereof, and shall direct the board to certify its record in the case to the court. On the return day, the cause shall be heard by the Supreme Court, unless for a good reason the same be continued. No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the board as certified to by it. The review shall not be extended further than to determine whether the board has regularly pursued its authority, including a determination of whether the decision or order under review violates any provision of the Constitution of the United States, or of the State of California. The findings and conclusions of the board on questions of fact shall be final and shall not be subject to review. The board and each party to the proceeding before the board shall have the right to appear in the review proceeding. Upon the hearing, the Supreme Court shall enter judgment either affirming or setting aside the order or decision of the board. The provisions of the Code of Civil Procedure of this State relating to the writs of review shall, so far as applicable and not in conflict with the provisions of this act apply to proceedings instituted in the Supreme Court under the provisions of this section." (Statutes of California, 1933, page 703.)

The Appellants and Their Business.

The appellants, Matson Navigation Company and The Oceanic Steamship Company, are corporations organized under the laws of California.

Matson Navigation Company is, and was at all times involved herein, engaged in the transportation of goods and passengers between ports in the territory of Hawaii and ports on the Pacific Coast of the United States. All of its transportation business is, and was at all said times, interstate and foreign. All of the revenue of Matson Navigation Company involved in the dispute arose out of the transportation of passengers and merchandise in interstate and foreign commerce.

The Oceanic Steamship Company is, and was at all said times, engaged in the transportation of passengers and goods between ports in the South Sea Islands, Australia and New Zealand and ports in the territory of Hawaii and the Pacific Coast of the United States. As in the case of Matson Navigation Company, all of its transportation business is and was interstate and foreign. All of the revenue of The Oceanic Steamship Company involved in the dispute arose out of its transportation of passengers and merchandise in interstate and foreign commerce.

The foregoing facts were stipulated by the parties before the Supreme Court (R. 60). It was further stipulated that none of the transportation business of either of said companies is or was intrastate in its nature and that no goods, wares, merchandise or passengers are, or ever were, transported by either of said companies between points within the State

of California (R. 60). It was further stipulated that:

> "Although the transportation business of Matson Navigation Company and The Oceanic Steamship Company was conducted exclusively in interstate and foreign commerce, and although the additional assessment in controversy was computed based entirely upon a part of the revenue derived from such transportation in interstate and foreign commerce, nevertheless the petitioners (appellants) did engage, during the years 1930 and 1931, in other substantial activities of a purely intrastate character, the tax computed upon the revenue from such purely intrastate business having been already paid and not being involved in the present controversy" (R. 61).

Matson Terminals, Inc., is interested in this proceeding only in so far as it is a party to a consolidated return. No portion of the tax which is under attack in these proceedings is apportionable to this company. All of the transportation activities of the two other appellants are interstate or foreign.*

The Tax in Dispute.

The tax in dispute in this case is that imposed under the Bank and Corporation Franchise Tax Act for the year 1931, which, under the act, is measured by the net income of the companies for the preceding year. Matson Navigation Company and The Oceanic Steamship Company, in filing their 1931 return, omitted from the statement of their net income all portions thereof derived from interstate or foreign com-

*Unless otherwise noted, the word "appellants", when used herein, refers only to appellants Matson Navigation Company and The Oceanic Steamship Company, and not to Matson Terminals, Inc.

merce, and paid a tax of $12,845.30, which was computed by applying to the other net income, i. e., to the net income derived from their intrastate activities, the rate prescribed by statute. The Franchise Tax Commissioner, on March 5, 1932, gave notice of intention to impose an additional tax of $101,045.92 (R. 12-14), this amount including a levy of 4% of the total income from the interstate and foreign transportation business of the appellants. Appellants protested against this proposed assessment and thereafter, on November 23, 1932, the Franchise Tax Commissioner, after notice and hearing, imposed an additional tax of $19,637.71 (R. 14-15) (instead of the $101,045.92 originally proposed to be assessed). This is the tax which is in dispute in the present proceeding. The Commissioner arrived at this amount by allocating to California 22.2% of the total net income derived from the interstate and foreign transportation business of appellants, this percentage representing the proportion of the net income which had been derived from freight and passenger business originating in the State of California. As the Supreme Court states:

> "In arriving at this result, the commissioner allocated to income from business done in this state that portion of petitioners' income from its transportation business done within and without the state which the amount of business originating in this state bore to the total business done" (R. 63).

The transportation business referred to by the Supreme Court was entirely interstate and foreign.

Pursuant to the statutory procedure, appellants took an appeal from the ruling of the Franchise Tax Commissioner to the State Board of Equalization, asserting, among other things, that the tax thus imposed violated the provisions of the Constitution of the United States and constituted a tax and burden upon interstate and foreign commerce. The assessment of the Commissioner was, on February 15, 1934, affirmed by the State Board of Equalization (R. 59).

Thereupon the appellants, pursuant to the provisions of Section 30 of the Bank and Corporation Franchise Tax Act, as amended in 1933, filed a proceeding in certiorari in the Supreme Court of California to review the ruling of the State Board of Equalization. The hearing of the writ of certiorari was had upon the petition (R. 7-15), and a stipulation which set forth the nature of appellants' transportation business, the fact that it was entirely interstate and foreign and further declared that:

> "It is only this revenue from interstate and foreign transportation business of Matson Navigation Company and The Oceanic Steamship Company upon which the additional assessment, the validity of which was assailed before the Board of Equalization and is now involved in this proceeding, is based" (R. 60).

The stipulation set forth the contentions of the parties as follows:

> "It is the view of the Commissioner that, in computing the tax he did not levy a tax on income from interstate and foreign commerce as such, but included a portion, to wit, 22.2% of such income in petitioners' net income allocated to

> California. The petitioners contend that the Commissioner had no right to allocate to California any portion of such income. Respondents contend that, petitioners being domestic corporations, it was proper for the Commissioner to allocate to California a portion of the income from interstate and foreign commerce, based upon the percentage of such business originating in California" (R. 61).

In their argument before the Supreme Court, appellants made two major contentions: first, that the Bank and Corporation Franchise Tax Act, as it existed in 1931, should not be interpreted as permitting the measurement of the tax by any part of the net income from interstate or foreign commerce; and second, that if the act were interpreted so as to permit the measurement of the tax by the income from such interstate or foreign commerce, it would violate the provisions of the Federal Constitution (R. 64).

The Supreme Court of California, by its decision of March 27, 1935, overruled both contentions. It held that the tax was imposed upon corporations "for the privilege of exercising their corporate franchises within this state * * * whether engaged in interstate or foreign commerce or not, so long as such corporation is doing some intrastate business as well"; that the act imposes the franchise tax "for the privilege of engaging in intrastate commerce" and that where a corporation is engaged both in intrastate *and* interstate commerce, "income from interstate or foreign commerce shall be included in measuring the tax to the extent limited in the act"; and, finally, that

"there is nothing in the section (Sec. 10) which even by implication excludes from the measure of the tax imposed for the privilege of exercising the corporate franchise to do intrastate business, income from interstate or foreign commerce which is reasonably attributable to business done within this state" (R. 66, 67).

The second contention of appellants, with respect to the constitutionality of the act, was likewise overruled (R. 67-70). A petition for rehearing having been denied by the Supreme Court of California on April 25, 1935 (R. 78), the present appeal was taken.

SPECIFICATION OF THE ASSIGNED ERRORS INTENDED TO BE URGED.

The appellants have heretofore filed their statement of the points relied on, in conformity with Rule 13 (R. 79-81). Assignments of error were duly filed (R. 1-4). The following is a summary of the errors relied upon:

(1) The Supreme Court of California erred in holding that the State Bank and Corporation Franchise Tax Act does not violate Section 8 of Article I of the Constitution of the United States and in holding that it does not impose a tax on interstate and foreign commerce, although it held that said act imposed an excise tax on the doing of business and allowed the levy of a tax thereunder, not only on the local business of appellants, but also upon a part of their interstate and foreign business, to wit: that part of such

interstate and foreign business which originated in California (Assignments of Errors, Nos. 1, 2, 3, 4, 7, 10, 13, 14).

(2) The Supreme Court of California erred in holding that said act does not deny to appellants the equal protection of the laws, although it purports to tax the intrastate business of all corporations alike, but measures the tax, in the case of appellants, in part by their interstate and foreign business and, in the case of other corporations doing no interstate or foreign business, measures the tax by the intrastate business alone (Assignment of Errors, Nos. 5, 8, 11, 15).

(3) The Supreme Court of California erred in holding that the said act does not deprive appellants of their property without due process of law, although it imposes a tax arbitrarily and without reasonable foundation upon interstate and foreign commerce for the purpose of measuring a tax on the intrastate and local business of appellants (Assignments of Errors, Nos. 6, 8, 12).

SUMMARY OF ARGUMENT.

I. The tax is an excise tax upon the actual doing of business.

II. The tax in its actual operation is a burden on interstate and foreign commerce.

(a) The nature of the tax, and its effect upon interstate commerce, is determined by its actual operation and not by the name which

may be given it by the state legislature or the state courts.

(b) Transportation is commerce.

(c) It is immaterial that the taxpayer is engaged in intrastate as well as interstate commerce, if in fact interstate commerce is burdened.

(d) The objection that the state tax constitutes an actual burden upon interstate and foreign commerce loses none of its validity because of the fact that the particular taxpayer happens to be a domestic corporation.

III. The tax is not a mere incidental burden on interstate and foreign commerce.

(a) The present tax is not a property tax.

(b) Cases involving income taxes do not apply. Cases providing for the equitable apportionment of the value of a unitary business do not apply.

(c) Cases dealing with the taxation of the "right to be" of a corporation have no application.

IV. Even construed as the state says it should be, this tax is an occupation tax; and being increased because of interstate business done, is void.

V. The state statute, as interpreted, denies to appellants the equal protection of the laws.

VI. The state statute, as interpreted, deprives appellants of their property without due process of law.

ARGUMENT.

I. THE TAX IS AN EXCISE TAX UPON THE ACTUAL DOING OF BUSINESS.

The state act was passed pursuant to the provision of the state constitution that

> "all financial, mercantile, manufacturing and business corporations doing business within the limits of this state * * * shall annually pay to the state for the privilege of exercising their corporate franchises within this State a tax according to or measured by their net income. The amount of such state tax shall be equivalent to four per cent of their net income."
>
> *Constitution of California,* Article XIII, Sec. 16.

The tax is imposed only on such corporations as are "doing business within the limits of this state". The tax is defined as one "for the privilege of exercising their corporate franchises" within the state.

The same limitation and description of the tax is repeated in the statute itself. It provides (in Section 4) that "every financial, mercantile, manufacturing and business corporation doing business within the limits of this state * * * shall pay annually to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income * * *". By the same section an offset is allowed "against said franchise tax" and a minimum tax is provided "for the said privilege".

Stat. Cal. 1929, p. 20.

In view of the statutory language alone, it is clear that the tax is an excise or privilege tax and is levied upon the doing of business within the state. The remedies for the collection of the tax are not confined to the ordinary proceedings to collect property taxes. Under Section 31, suit may be brought against the corporation and judgment obtained for the amount of the delinquent tax (*Stat. Cal. 1929,* p. 32). In addition, if the tax is not paid within twelve months after delinquency in the first installment, the corporate powers, rights and privileges are suspended, if the corporation be a domestic one, and the right to do intrastate business is forfeited, if it be foreign. Any attempt to exercise such rights after suspension or forfeiture is a crime (Sec. 32, *Stat. Cal. 1929,* p. 33). The tax, therefore, has all the essential elements of a license tax, with the usual penalty that business cannot be carried on if the tax is not paid.

The tax is levied on the doing of business and not upon the right "to be" a corporation, which is granted by the state of creation to its own domestic corporations. This is clear from the terms of the act, which restricts the levy to those corporations which are "doing business". It is also clear from the fact that the tax is levied alike on all corporations, including, without distinction, both domestic corporations deriving their "right to be" from the taxing state and also foreign corporations. This circumstance was held to be sufficient to show that a tax was not levied on the right of corporate existence in *Philadelphia and Southern Steamship Co. v. Pennsylvania,* 122 U. S. 326, 342. Referring to the earlier case of *State Tax*

on Railway Gross Receipts, 15 Wall. 284, the court said:

> "The second ground on which the decision referred to was based was, that the tax was upon the franchise of the corporation granted to it by the State. We do not think that this can be affirmed in the present case. It certainly could not have been intended as a tax on the corporate franchise, because, by the terms of the Act, it was laid equally on the corporations of other States doing business in Pennsylvania."

We are not, however, left to inference from the statutory language for the purpose of showing that the tax under discussion is not levied upon the right to exist, or upon the right to use the corporate form, granted by the state of incorporation. The question has been settled by decision of the Supreme Court of California. In *Union Oil Associates v. Johnson,* 2 Cal. (2nd) 727, a California corporation which merely held stock in another company and engaged in no other activity than the receipt and disbursements of dividends, was held not to be liable to taxation under the Bank and Corporation Franchise Tax Act, because it was not a "business" corporation and was not engaged in "doing business".

In this respect the case is identical with *Anglo-Chilean Nitrate Sales Corporation v. Alabama,* 288 U. S. 218, where this court held that the corporate franchise tax of Alabama "is laid, not upon the authorization, right or privilege to do business in Alabama, but upon the actual doing of business" for the reason that the State Supreme Court had held, in

State v. National Cash Credit Association, 224 Ala. 629, that a corporation which merely invested in and owned property in the state was not subject to the tax. *Union Oil Associates v. Johnson,* supra, determines with equal finality that the California tax now before the court is laid on the actual doing of business, and "not upon the authorization, right or privilege to do business".

Under the act, as thus interpreted, a corporation which derives its corporate existence from the state need not pay the tax unless it actually engages in "doing business" within the state. If it "does business" within the state, it must pay the tax on the same basis, whether it derives its corporate life from California or from some other jurisdiction. The excise, therefore, is upon the transaction of business by the corporation and not upon the right of corporate existence.

The nature of the tax is similarly described in the decision of the Supreme Court of California in the present case, where it is said:

> "the act was intended to and by its terms does impose on the corporations of the type mentioned, for the privilege of exercising their corporate franchises within this state the tax therein provided, whether such corporation is a foreign or domestic corporation, and whether engaged in interstate or foreign commerce or not, so long as such corporation is doing some intrastate business as well."
>
> *Matson Navigation Co. et al. v. State Board of Equalization, et al.,* 43 Pac. (2nd) 805. (R. 66.)

Aside from the language of the statute itself, it appears by decisions of the highest court of the state that:

(1) The tax is not an income tax.

The Pacific Co. Ltd. v. Johnson, 212 Cal. 148.

(2) The tax is not a tax on the "right to be" or corporate existence of domestic corporations, or upon the right to enjoy corporate facilities.

Union Oil Associates v. Johnson, 2 Cal. (2nd) 727.

Especially as the act itself levies the tax indifferently upon all corporations, whether domestic or foreign.

Philadelphia and Southern Steamship Co. v. Pennsylvania, 122 U. S. 326.

(3) The tax is an excise tax upon the actual doing of business, and not upon the mere authorization to do business.

Union Oil Associates v. Johnson, 2 Cal. (2nd) 727;

Anglo-Chilean Nitrate Sales Corporation v. Alabama, 288 U. S. 218;

Matson Navigation Co. v. State Board of Equalization, 43 Pac. (2nd) 805.

II. THE TAX IN ITS ACTUAL OPERATION IS A BURDEN ON INTERSTATE AND FOREIGN COMMERCE.

The tax against appellants being not an income tax, nor a tax upon the right to be a corporation, but being an excise tax on the doing of business, the question

remains whether in actual operation it is a tax upon interstate or foreign commerce.

This question is answered by considering what was done by the state officials under the law in the present case.

The appellants' business was not confined to interstate and foreign commerce. They also engaged in other activities "of a purely intrastate character" (R. 61). The tax of 4% computed upon the revenue from these purely intrastate activities, amounting to $12,845.30, was shown by appellants' return to be due and has been paid by them and is not involved in the present controversy (R. 61).

The Franchise Tax Commissioner, acting under section 25 of the statute, thereupon proposed to assess, and after overruling the protest of appellants, did assess, an additional tax of $19,637.71. The Commissioner reached this figure by taking the total net income received by appellants from their interstate and foreign transportation business, and by allocating to California 22% of this income, "that percentage correctly representing the proportion of the net income derived from business originating in this state" (R. 63). He thereupon assessed the four per cent tax against the 22% thus ascertained.

In other words, the Commissioner held

(1) that the tax with respect to the intrastate business of appellants had been fully paid,

(2) that there should be assigned or allocated to California, from the total net income of appellants derived from their interstate and foreign

transportation business, such proportion thereof as the interstate and foreign business of appellants originating in California bore to the total amount of their interstate and foreign transportation business,

(3) that the proportion aforesaid being 22.2%, an additional tax should be imposed upon appellants, equal to four per cent of 22.2% of the total net income of appellants from their interstate and foreign transportation business.

It is clear, therefore, that the additional tax was computed on a definite part of the income from an interstate and foreign transportation business. This basis of computation was approved by the State Board of Equalization (R. 57-59) and by the Supreme Court (R. 63, 64).

Appellants contended before the Supreme Court that income from interstate and foreign commerce was not income from business "done within the state" within the meaning of section 10 of the act. This contention was expressly overruled by the Supreme Court, which held that in cases where a corporation was engaged in both intrastate and interstate commerce, the act should be interpreted as providing "that income from interstate or foreign commerce shall be included in measuring the tax to the extent limited in the act" (R. 67).

The Supreme Court further held that the formula adopted by the Commissioner in the present case (i. e., the allocation to California of that proportion of the total net income from interstate and foreign business

which interstate and foreign business arising in California bore to the total amount of interstate and foreign business) "is well calculated to accomplish the purpose" provided in the clause of Section 10, which declares that any formula for apportioning business done within the State of California must be "fairly calculated to assign to the state the portion of net income reasonably attributable to the business done within this state and to avoid subjecting the taxpayer to double taxation" (R. 66).

The Supreme Court held, therefore, that the Commissioner acted in full compliance with the statute when he (1) included income from interstate and foreign commerce in measuring the tax, (2) assigned to California as "business done within the state" the portion of such income which resulted from interstate or foreign business originating in the state, and (3) computed the tax on this part of the income from interstate and foreign commerce.

It is submitted that the act, as thus interpreted and applied, necessarily and inevitably burdens and regulates the conduct of interstate and foreign commerce. The Supreme Court held that the act should be interpreted as justifying a process of assessment which involves these steps:

(a) An ascertainment of the net income from intrastate business and the assessment of a tax thereon at the statutory rate;

(b) The ascertainment of the total income from interstate and foreign business;

(c) The ascertainment of that proportion of (b) which the interstate and foreign business originating in California bears to the total interstate and foreign business; and

(d) An assessment at the statutory rate upon the result obtained by process (c), over and above the tax ascertained by process (a).

Both sides are agreed that process (a) is proper. Appellants contend that the process involved in steps (b) to (d) is directed solely at interstate and foreign commerce and necessarily constitutes a burden upon them.

The tax, by the very method of its ascertainment and imposition, as it was ascertained and imposed in the present case, burdens the transaction of interstate and foreign transportation. The act is interpreted to mean that after the ascertainment of profits from intrastate business and the imposition of a tax thereon, an additional tax must be imposed equivalent to a percentage of all profits derived from transportation which is purely interstate and foreign. The interstate and foreign business is declared by the State Supreme Court to be one of the objects towards which the tax is directed. It is the target towards which the arrow is aimed. For the court says in so many words that

"the act clearly, without ambiguity, imposes on foreign and domestic corporations * * * when they are engaged in both intrastate and interstate commerce, for the privilege of engaging in intrastate commerce, a franchise tax measured by or according to their net income, and that the act

provides in such cases that income from interstate or foreign commerce shall be included in measuring the tax to the extent limited in the act."

This language defines the scope of a tax on the actual doing of business. For failure to pay it the right to do business is forfeited. No corporation which does any intrastate business at all can engage in any interstate or foreign business at all without being subjected to this burden upon its interstate or foreign activities. The essence of the burden is not effectively disguised by the use of the glib phrase that the tax is one "for the privilege of engaging in intrastate commerce". The attempt to reach the avails of interstate and foreign commerce is none the less obvious and is indeed frankly avowed.

Nor can the incidence of the tax, as a discouragement to the transaction of interstate and foreign business, be disguised because it is measured by the profits therefrom, rather than by the instrumentalities used therein or the total receipts yielded thereby. Profit is the inducement for engaging in trade and commerce. If the state may say, with specific intent directed at such commerce, that all profits therefrom must pay their toll and that all right to do intrastate business will be forfeited for non-payment of the toll, such trade and commerce is burdened just as effectively as by direct prohibition. The statute, as interpreted by the state Supreme Court, comes within the condemnation of all state legislation which in its operation constitutes a burden on interstate and foreign commerce. It provides for the exaction of a tax on the actual carrying

on of interstate and foreign commerce and is therefore unconstitutional and void.

Leloup v. Port of Mobile, 127 U. S. 640;
Sprout v. South Bend, 277 U. S. 163;
New Jersey Bell Telephone Co. v. State Board of Taxes, 280 U. S. 338;
Cooney v. Mountain States Telephone and Telegraph Co., 294 U. S. 384;
Looney Co. v. Crane Company, 245 U. S. 178;
International Paper Co. v. Massachusetts, 246 U. S. 135;
Alpha Portland Cement Co. v. Massachusetts, 268 U. S. 203;
Cudahy Packing Co. v. Hinkle, 278 U. S. 460;
Air-Way Electric Appliance Corporation v. Day, 266 U. S. 71.

Not only is the tax bad because of its actual imposition of a burden on interstate commerce, but the logical effect of the state court's interpretation is to include interstate commerce in the statute's professed object, as well as in its measure. For the Supreme Court holds that when the act provides that the tax shall be measured by "the portion of net income reasonably attributable to business done within this state" (Sec. 10), it thereby defines the measure of the tax as including a part of the income from interstate and foreign commerce; and this necessarily on the theory that "business done within this state" includes some interstate and foreign business. But the identical phrase "within this state" is used in defining the subject and object of the tax in Section 4, which de-

clares that the tax is levied "for the privilege of exercising its corporate franchises within this state". If the phrase in Section 10 fixes a measure inclusive of some interstate and foreign commerce, it is evident that the object sought to be reached, as expressed in the same phraseology, must include the same interstate and foreign activities.

The State Supreme Court seems to assume that the burden on interstate and foreign commerce is permissible because the tax reaches, not all the avails of such commerce, but only so much thereof as arose from business originating in California. This, we submit, involves a misconception of the immunity of interstate commerce from state regulation. This immunity extends to traffic *from* California as well as traffic *into* California. The state may not forbid passengers and freight from leaving the state, any more than it can forbid their entrance. Not being able to forbid the departure, it cannot levy a burden thereon by taxation, as it purports to do by the present statute, as now interpreted.

Furthermore, the statute by its necessary operation regulates the manner of carrying on interstate commerce. If perchance 90% of the business of Matson Navigation Company between San Francisco and Honolulu should originate in San Francisco, the California tax would be correspondingly increased. If, on the contrary, 90% of the business should originate in Hawaii, the tax would be correspondingly lightened. Necessarily, therefore, the tax would tend to encourage transportation to California in interstate and

foreign commerce and discourage transportation therefrom.

This means of taxation, if allowed, would enable each state to compete with others by the imposition of competitive rates, so that the state which imposed the highest rate on the transportation of persons and freight from its borders could prevent the passage of persons and property to other jurisdictions. No plainer case of attempted control over interstate and foreign commerce could be imagined.

The Nature of the Tax, and its Effect Upon Interstate Commerce, is Determined by its Actual Operation and Not by the Name Which May be Given it by the State Legislature or the State Courts.

The statute here involved is in form and in substance a tax on the doing of business. As shown above, the Supreme Court so describes it and so enforces it. The tax is imposed only when business is done, and, in the absence of business done, does not apply.

In the present case it was held by the Supreme Court that it operates on business done purely in interstate and foreign commerce. This actual operation of the statute controls the present appeal. It is immaterial that the Supreme Court of the state refers to the tax, in its opinion, as one upon business done "in intrastate commerce".

The State Supreme Court's description of the tax arose in the following way. Appellants contended "that the Franchise Tax Act, properly construed, does not include in its tax base income derived

from interstate or foreign commerce" (R. 64), and, specifically, contended that the words "business done within this state", as used in Section 10 of the act, were restricted to intrastate business and did not include interstate or foreign commerce. This contention was overruled by the Supreme Court, which held that income from interstate or foreign commerce should be included in measuring the tax and that the statute, in referring to "business done within this state", included not only intrastate but interstate and foreign business as well. In this respect the Supreme Court said:

> "We think that by section 4 of the act as limited by sections 5 and 10, as above quoted, the act was intended to and by its terms does impose on the corporations of the type mentioned, for the privilege of exercising their corporate franchises within this state, the tax therein provided, whether such corporation is a foreign or domestic corporation, and whether engaged in interstate or foreign commerce or not, so long as such corporation is doing some intrastate business as well. We are likewise of the opinion that the act clearly, without ambiguity, imposes on foreign and domestic corporations of the classes mentioned, when they are engaged in both intrastate and interstate commerce, for the privilege of engaging in intrastate commerce, a franchise tax measured by or according to their net income, and that the act provides in such cases that income from interstate or foreign commerce shall be included in measuring the tax to the extent limited in the act.
>
> "Petitioners' contention that the words 'derived' from business done within this state' found in section 10, must be construed to mean business

> solely done in intrastate commerce, is untenable. When standing alone, such words may be capable of the interpretation contended for (*Pacific Express Co. v. Siebert,* 142 U. S. 339), but when read with the rest of section 10 and with sections 4 and 5, they cannot be so interpreted without doing violence to the language used and without imposing limitations not therein contained. Section 10, in the interests of avoiding double taxation, does limit section 4 to the extent of excluding from the measure of the tax income from business done entirely outside the state, but reasonably and properly construed, there is nothing in the section which even by implication excludes from the measure of the tax imposed for the privilege of exercising the corporate franchise to do intrastate business, income from interstate or foreign commerce which is reasonably attributable to business done within this state" (R. 66, 67).

The Supreme Court of the state, therefore, held that the measure of the tax included (a) income from intrastate business and also (b) income from interstate or foreign commerce "which is reasonably attributable to business done within this state".

Having so held, the gratuitous description of taxation as having been imposed "for the privilege of engaging in intrastate commerce" is meaningless and cannot change the real nature of the exaction.

> "A state may not burden interstate commerce or tax property beyond her borders under the guise of regulating or taxing intrastate business."
>
> *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203, 218;
>
> *Cudahy Packing Co. v. Hinkle,* 278 U. S. 460, 466.

The tax must be tested "by its substance—its essential and practical operation—rather than its form or local characterization".

International Paper Co. v. Massachusetts, 246 U. S. 135, 142;

Air-Way Electric Appliance Corporation v. Day, 266 U. S. 71, 82.

The test is whether "the facts do or do not demonstrate that the tax as, a practical matter, constitutes a burden upon interstate commerce".

Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 562.

"Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form."

Galveston, Harrisburg and San Antonio Ry. Co. v. Texas, 210 U S. 217, 227.

"But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the state as shown by its necessary operation upon interstate commerce."

Western Union Telegraph Co. v. Kansas, 216 U. S. 1, 27.

Although the subject purported to be taxed is within the power of the state, the measure of the tax will be

scrutinized to determine whether the exaction burdens interstate commerce.

Western Union Telegraph Co. v. Kansas, 216 U. S. 1;

Ludwig v. Western Union Telegraph Co., 216 U. S. 146;

Looney v. Crane Co., 245 U. S. 178.

Transportation is Commerce.

This point need not be labored. In cases involving merchandising difficult questions may arise as to when a particular form of activity falls within the domain of interstate and foreign commerce. In the business of transportation between a state and another state or territory or a foreign country, no such question can arise. For transportation is itself commerce.

In *Philadelphia and Southern Steamship Co. v. Pennsylvania,* 122 U. S. 326, 335, this court said:

> "The question which underlies the immediate question in the case is whether the imposition of the tax upon the Steamship Company's receipts amounted to a regulation of, or an interference with, interstate and foreign commerce, and was thus in conflict with the power granted by the Constitution to Congress? The tax was levied directly upon the receipts derived by the company from its fares and freights for the transportation of persons and goods between different States, and between the States and foreign countries, and from the charter of its vessels which was for the same purpose. This transportation was an act of interstate and foreign commerce. It was the carrying on of such commerce. It was that, and nothing else. In view of the decisions of this court, it

cannot be pretended that the State could constitutionally regulate or interfere with that commerce itself. But taxing is one of the forms of regulation. It is one of the principal forms. Taxing the transportation, either by its tonnage, or its distance, or by the number of trips performed, or in any other way, would certainly be a regulation of the commerce, a restriction upon it, a burden upon it. Clearly this could not be done by the State without interfering with the power of Congress. Foreign commerce has been fully regulated by Congress, and any regulations imposed by the States upon that branch of commerce would be a palpable interference. If Congress has not made any express regulations with regard to interstate commerce, its inaction, as we have often held, is equivalent to a declaration that it shall be free, in all cases where its power is exclusive; and its power is necessarily exclusive whenever the subject matter is national in its character and properly admits of only one uniform system. See the cases collected in *Robbins v. Shelby Taxing District,* 120 U. S. 489, 492, 493. Interstate commerce carried on by ships on the sea is surely of this character."

To the same effect is:

Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196.

It is Immaterial that the Taxpayer is Engaged in Intrastate as Well as Interstate Commerce, if in Fact Interstate Commerce is Burdened.

The State Supreme Court seems to have labored under the impression that interstate and foreign com-

merce can be taxed and burdened if the taxpayer, in addition to its interstate and foreign commerce, also engages in intrastate activities. This is not law. If in fact the burden operates upon interstate or foreign commerce, it is wholly immaterial that some intrastate business is also done.

Sprout v. South Bend, 277 U. S. 163;
New Jersey Bell Telephone Co. v. State Board of Taxes, 280 U. S. 338;
Cooney v. Mountain States Telephone & Telegraph Co., 294 U. S. 384.

In *Cooney v. Mountain States Telephone & Telegraph Co.,* 294 U. S. 384, 393, this court said:

> "* * * Where the tax is exacted from one doing both an interstate and intrastate business, it must appear that it is imposed solely on account of the latter; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the tax; and that the one who is taxed could discontinue the intrastate business without also withdrawing from the interstate business."

The tax here involved fails to comply with at least three of the foregoing requirements. It is not imposed solely on account of intrastate business, because an additional tax is imposed, and was imposed in the present case, on account of interstate and foreign business. The amount of the tax is increased, and was increased in the present case, because of the interstate business done. Finally, a domestic corporation engaged exclusively in interstate commerce would be subject to

the tax, although the Supreme Court of the state held that a foreign corporation exclusively engaged in interstate commerce would not. The tax, therefore, fails to measure up to the requirements applicable where the taxpayer is engaged in both intrastate and interstate business.

The Objection that the State Tax Constitutes an Actual Burden Upon Interstate and Foreign Commerce Loses None of its Validity Because of the Fact that the Particular Taxpayer Happens to be a Domestic Corporation.

It is not permissible to impose a burden upon the interstate commerce carried on by any person or corporation whatever.

In *Philadelphia and Southern Steamship Co. v. Pennsylvania,* 122 U. S. 326, 344, this court held to be invalid a tax on the interstate commerce of a domestic corporation and said:

> "The decision in this case, and the reasoning on which it is founded, so far as they relate to the taxation of interstate commerce carried on by corporations, apply equally to domestic and foreign corporations."

Again, in *Galveston, Harrisburg & San Antonio Ry. v. Texas,* 210 U. S. 217, 228, the court said:

> "Of course, it does not matter that the plaintiffs in error are domestic corporations, or that the tax embraces indiscriminately gross receipts from commerce within as well as outside of the state."

To the same effect are:

Ozark Pipe Line Corporation v. Monier, 266 U. S. 555;

New Jersey Bell Telephone Co. v. State Board of Taxes, 280 U. S. 338;

H. K. Mulford Co. v. Curry, 163 Cal. 276, 286.

III. THE TAX IS NOT A MERE INCIDENTAL BURDEN ON INTERSTATE AND FOREIGN COMMERCE.

We anticipate an attempt to justify the present tax as involving "only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other and general contribution to the cost of government" (*American Manufacturing Co. v. St. Louis,* 250 U. S. 459, 464). No such justification can be sustained in the present case, however, because here the tax operates on "the act of engaging in interstate commerce" (*Pullman Co. v. Richardson,* 261 U. S. 330, 338) and the effect on interstate commerce is direct and immediate.

The Present Tax Is Not a Property Tax.

It is true that property taxes, so designated and calculated to reach specific assets within the taxing jurisdiction, are valid even though the property be used in interstate commerce; and in the case of such a tax the state may use any appropriate means of valuing the property, even by reference to a proportion of the gross receipts from such commerce, where the receipts would not themselves be directly taxable. *Pullman Co. v. Richardson,* 261 U. S. 330. In

the present case we have, of course, no tax on property. The tax here involved is not described as, or claimed to be, a levy on the assets of appellants; it is not imposed in lieu of the ordinary property taxes; its amount has no relation to the value of the property owned within the state; it is said to be a privilege, or excise, or franchise tax. Cases dealing with property taxes must therefore be disregarded.

Cases Involving Income Taxes do Not Apply.

The court below relied largely on cases involving state income taxes and particularly on *United States Glue Co. v. Oak Creek,* 247 U. S. 321. The essence of that decision lies in its treatment of an income tax as "but a method of distributing the cost of government, like a tax on property, or upon franchises treated as property". In the case of such a tax it was held that, in the circumstances appearing in the *United States Glue Co.* case, there was no direct burden on interstate commerce.

General property taxes and general income taxes may be levied by the states, and it is no objection that some of the property may have been used in commerce, or some of the income derived therefrom. In such cases the effect on commerce may be incidental and remote. On the other hand, even an income tax pure and simple may in its actual operation transcend the limits of permissible state action under the constitution, as in *Hans Rees' Sons v. North Carolina,* 283 U. S. 123.

But the reasoning of *United States Glue Co. v. Oak Creek,* supra, that the effect of a general income tax

on interstate commerce may be incidental, does not apply here, because the present tax is not an income tax. Any such claim was expressly denied in

Pacific Co., Ltd. v. Johnson, 285 U. S. 480.

See, also,

The Pacific Co., Ltd. v. Johnson, 212 Cal. 148.

We need not go beyond these decisions to show that no income tax is here involved. The state is not exerting its power to tax generally and directly all income of its residents and the purely local income of non-residents. It is, on the contrary, imposing an excise or privilege tax on the actual doing of business; it withholds the right to do business if the tax is not paid; it measures the amount of the tax, first, by the local or intrastate business of residents and non-residents alike, and then, in addition, by such part of the interstate and foreign income from residents and non-residents as arises from transactions within the borders of the state. It is as much an exaction on the doing of interstate and foreign commerce as if these appellants had been compelled to pay one dollar, or one hundred dollars, or one thousand dollars, on every passenger or pound of freight leaving the ports of the state for those of other states or foreign countries.

If the law were otherwise, the constitution could be nullified by a mere change in the manner of the measurement of the tax, although the burdening effect on commerce would be equally clear. The state, desiring to tax the actual transaction of interstate business, and knowing that a toll based on the total amount of operations, or on the number of instrumentalities em-

ployed, is forbidden, would only need to fix the toll as being a certain percentage of the interstate and foreign profits. The interstate operations would just as surely be burdened and controlled. To permit such evasion would, of course, destroy the constitutional limitation. And surely such a tax on the doing of business could not be justified because the state, if it refrained from taxing the business at all, and merely levied a general income tax on all net profits, would not exceed its powers merely because some of the income was originally derived from dealings in interstate commerce. The two situations are governed by wholly different considerations.

The error of the State Supreme Court lay in the assumption that because an income tax might be levied on all income of a resident, even though some of the income resulted from interstate transactions, therefore all restraints had been removed against a direct burden on interstate commerce, provided only that the exaction was measured by income. This assumption ignores the distinction between different kinds of taxes in respect to their actual operation and effect. Gross receipts from interstate commerce are not taxable directly, but may be validly used as a measure of a property tax. *Pullman Co. v. Richardson,* 261 U. S. 330. So of other subjects of taxation. The present tax burdens interstate commerce because it is avowedly directed against it, because it is aimed at a specific interstate activity, i. e., the transportation of passengers and freight from California, and because it taxes not property or income but the actual doing of business, including interstate and foreign business. Its

vice is inherent in its subject and object and exists wholly irrespective of the question whether its amount is gauged by the volume of transactions or by the net profit derived therefrom. In view of this subject and object, the doctrine that a general property or income tax may incidentally affect interstate commerce without impairment of its validity has no relevance to the present situation.

It is submitted, moreover, that the cases sustaining net income taxes go no further at their utmost than to furnish support for the proposition that possession of certain privileges may be taxed, for example the privilege of possessing the benefits of citizenship, or of owning property or carrying on business within the state; and that such a tax may, generally speaking, be measured by net income attributable to or connected with the possession of the privilege or group of privileges that are the subject of the tax, even though the same income is also attributable to or connected with property or activity not directly taxable. Thus in *Lawrence v. State Tax Commission,* 286 U. S. 276, in speaking of an income tax applicable to income from sources both within and without the taxing state, the court says that the power of the state is, with stated exceptions, unrestricted "so long as the tax imposed is upon property within the state or on privileges enjoyed there." The income tax cases certainly do not sustain any general proposition, to be mechanically applied, that a net income tax is not a burden on the income taxed. See *Alpha Portland Cement Co. v. Massachusetts,* 268 U. S. 203. Here, as in the *Anglo-Chilean* case, the tax is not a

tax on the possession of a privilege or group of privileges, but a tax directly upon the activity of engaging in foreign commerce.

Cases Providing for the Equitable Apportionment of the Value of a Unitary Business do Not Apply.

The court below relied also on

Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, and

Bass, Ratcliff & Gretton v. State Tax Commission, 266 U. S. 271,

as sustaining the present tax.

Both of these cases involved corporations carrying on a unitary business, consisting partly of manufacturing and partly of selling. In the *Underwood* case the manufacturing activities were located in the taxing state, while in the *Bass, Ratcliff & Gretton* case only the selling activities were there carried on. The remaining activities of each corporation had their situs in other taxing jurisdictions. In the *Underwood* case Connecticut, and in the *Bass* case New York, undertook to impose a franchise tax. In each statute it was provided that where the business of a corporation was done partly within and partly without the state, the tax should be computed on that percentage of its total income which the property of the corporation within the state bore to the total value of its property. Obviously, the valuation of the local activities of unitary businesses, spread over many jurisdictions, was a difficult one. In many cases it would be difficult to determine mathematically what proportion of the

single, inter-related activity should be attributed to the manufacture of goods and what proportion to their sale. The allocation of total income in proportion to the value of the assets in the several states was held not to be unreasonable in the absence of a specific showing that interstate or extraterritorial values were being taxed, notwithstanding that some of the total income, which was used as one term of a complicated formula, had been derived from interstate or extraterritorial sources. The burden thus imposed was indirect and incidental to a reasonable method of ascertaining local values. Obviously no interstate or extraterritorial income as such was taxed.

The strict limitation of these cases is shown in *Hans Rees' Sons v. North Carolina,* 283 U. S. 123. That also was a case of a unitary corporate business, consisting both of manufacture and selling and spread over several jurisdictions. There also a state had imposed a tax upon that proportion of the total income which the local assets bore to the total assets; and the tax was levied, not on a franchise, but directly on the income itself. But proof was made of the exact proportion of profits which were attributable to the local manufacturing activities. It was held that since the formula approved in the *Underwood* case did in fact operate in such a way as to reach income which was not local, the tax was unconstitutional and void.

It follows that the mere use of total income as one element in a formula does not, in and of itself, show a tax upon interstate or extraterritorial values where the formula is not inherently unfair and shows no purpose to reach such constitutionally protected values,

and where there is no proof of its being applied to reach them. The result is otherwise where the facts show, as they did in the *Hans Rees* case, that notwithstanding the apparent fairness of the formula, the exempt object is really affected; and of course the result is otherwise where, as here, the state is consciously reaching out to add to the tax on local business, an additional tax "on the actual doing of business" levied with conscious and sole reference to those operations in interstate and foreign commerce which originate within its borders. To such a case the decisions on the fairness of the allocation of the value of a unitary business have no application.

Cases Dealing With Taxation of "Right to be" a Corporation have No Application.

The State Supreme Court cites *Schwab v. Richardson,* 263 U. S. 88. It and similar cases to the same effect have no relevance here, because they have to do with statutes which levy a tax on the "right to exist" of a domestic corporation. As pointed out above, this is not the character of the tax here involved. Neither by statutory description, nor by statutory operation, nor by judicial interpretation, can it possibly be so construed.

It is irrelevant that the state might have enacted a statute imposing a tax upon appellants' right to be a corporation, and might perhaps have measured that tax as this one is measured. The fact is that the state, for reasons sufficient to it, has not done so. As the court said in *Philadelphia and Southern Mail*

Steamship Company v. Pennsylvania, 122 U. S. 326: "Their business as carriers in foreign or interstate . . commerce cannot be taxed by the state under the plea that they are exercising a franchise."

See also *Anglo-Chilean Nitrate Sales Corporation v. Alabama,* 288 U. S. 218, in which case, as is apparent from the dissenting opinion, this point was in the court's mind, so that the decision necessarily stands for the proposition that in situations like the present one, the state's unexercised power to tax one subject will not sustain a tax on another subject.

IV. EVEN CONSTRUED AS THE STATE SAYS IT SHOULD BE, THIS TAX IS AN OCCUPATION TAX; AND BEING INCREASED BECAUSE OF INTERSTATE BUSINESS DONE, IS VOID.

The state's contention is that the tax here in question is a tax on the privilege of doing intrastate business. Our contention is that it is a tax directly upon the doing of business. In this part of our brief we shall assume with the respondent, that the tax is a tax on the privilege of doing intrastate business, making this assumption for the purpose of argument, in order to show that even if it were such a tax it would be void, at least as applied to income from interstate commerce.

As we have seen, payment of the present tax is a condition precedent to the continued transaction of intrastate business with respect to foreign corporations, and a condition precedent to the continued

transaction of any business with respect to domestic corporations. Thus, Section 32 of the Act provides in part:

> "Sec. 32. If a tax computed and levied hereunder is not paid before six o'clock p. m. on the last day of the twelfth month after the date of delinquency of the first installment thereof, the corporate powers, rights and privileges of the delinquent taxpayer, if it be a domestic corporation, shall be suspended, and if the delinquent taxpayer be a foreign corporation it shall thereupon forfeit its right to do intrastate business in this state."

Section 32 then goes on to say that after forfeiture of the right to go on with business because of nonpayment of the tax, continued activity shall be a misdemeanor, punishable by fine, or imprisonment, or both.

In the language of the Supreme Court of California, the present tax is "on foreign and domestic corporations * * * for the privilege of engaging in intrastate commerce." The state does not contend that this tax is a tax on the privilege of being a corporation.

It is, we submit, self evident that a tax on the privilege of carrying on an occupation, payment of which is a condition precedent to the continued carrying on of the occupation in question, is an occupation tax; a tax directly on the occupation. As the court said in *Leloup v. Port of Mobile,* 127 U. S. 640, concerning a tax described by the court as "a tax on

the privilege of doing the business" in which the taxpayer was engaged:

> "Of course, the exaction of a license tax as a condition of doing any particular business, is a tax on the occupation; and a tax on the occupation of doing a business is surely a tax on the business."

See also

Ozark Pipe Line Corp. v. Monier, 266 U. S. 555.

Now the whole of the present controversy arises out of the fact that the present tax, an occupation tax on corporations like appellants, that are engaged both in intrastate and interstate commerce, is greater because of the taxpayer's business in interstate commerce. The following statement from the opinion in *Sprout v. South Bend,* 277 U. S. 163, therefore applies:

> "A state may, by appropriate legislation, require payment of an occupation tax from one engaged in both intrastate and interstate commerce. * * * But in order that the fee or tax shall be valid, it must appear that it is imposed solely on account of the intrastate business; that the amount exacted is not increased because of the interstate business done; that one engaged exclusively in interstate commerce would not be subject to the imposition; and that the person taxed could discontinue the intrastate business without withdrawing also from the interstate business."

See

Cooney v. Mountain States Telephone and Telegraph Company, 294 U. S. 384, foot note 4.

An Occupation Tax That is Increased Because of the Taxpayer's Business in Interstate Commerce is Void, Whatever its Measure May be.

We have already shown that cases involving taxes imposed on the right to be a corporation are not in point. It may now be observed that *Sprout v. South Bend*, 277 U. S. 163, and the other cases cited above, establish the proposition that an occupation tax cannot be greater because the taxpayer is engaged in interstate commerce than it would be if he were not. It is clear, therefore, that a tax "for the privilege of engaging in intrastate commerce" cannot be validly "measured by" income from interstate commerce. The reasonableness of the rule so established is apparent. The levy of a tax for the privilege of engaging in intrastate commerce computed on the basis of income derived from interstate commerce cannot be defended as a *bona fide* attempt to reach the value to the taxpayer of the subject taxed.

V. THE STATE STATUTE AS INTERPRETED DENIES TO APPELLANTS THE EQUAL PROTECTION OF THE LAWS.

The tax under discussion is clearly one on the doing of business. If it is imposed on the doing of interstate and foreign business, it is void under principles already discussed. It can only be upheld as a tax on

the doing of intrastate or local business. This the lower court attempted to do. It said:

> "We are likewise of the opinion that the act clearly, without ambiguity, imposes on foreign and domestic corporations of the classes mentioned, when they are engaged in both intrastate and interstate commerce, for the privilege of engaging in intrastate commerce, a franchise tax measured by or according to their net income, and that the act provides in such cases that income from interstate or foreign commerce shall be included in measuring the tax to the extent limited in the act" (R. 66, 67).

It is not disputed that many corporations are subject to the act who do no interstate or foreign business at all, but whose business is confined to intrastate transactions. All such corporations pay four per cent of their income from such intrastate transactions and receive in return, according to the state Supreme Court, "the privilege of engaging in intrastate commerce". On the other hand, appellants and other corporations similarly situated, who do interstate as well as intrastate business, must pay, for the same privilege of engaging in intrastate commerce, not only four per cent of the income from their intrastate business, but also four per cent of such income from their interstate and foreign business as originates in California. The practical effect of the discrimination in the present case is that a corporation doing the same amount of intrastate business as appellants, but no interstate or foreign business, would pay for its so-called intrastate privilege only $12,845.30. If the tax stands, appellants must pay, for the same intrastate privilege,

not only this sum, but an additional $19,637.71, or something over 150% more than other corporations similarly situated with respect to intrastate business.

If the tax is levied on intrastate business, there is a clear case of unwarranted discrimination and a denial of the equal protection of the laws. There is no relation between the charge and the value of the privilege for which it is imposed.

Air-Way Electric Appliance Corporation v. Day, 266 U. S. 71.

The classification is not based on anything having relation to the purpose for which it is made, and the equal protection clause of the Fourteenth Amendment is therefore violated.

Southern Railway Co. v. Greene, 216 U. S. 400;
Royster Guano Co. v. Virginia, 253 U. S. 412.

In its opinion, the Supreme Court of California holds: (a) that the tax statute does not apply to foreign corporations which are doing business in this state, but which are engaged solely in interstate commerce; (b) that as to all corporations, foreign or domestic, doing some intrastate business, the statute does apply, and the tax is, as to them, computed on the entire net income derived from intrastate business, and on a portion of the net income derived from interstate business. These propositions are established by the following passages from the Supreme Court's opinion:

> "Thus the classification found in section 4 of the act here involved, as above quoted, necessarily excludes from the tax foreign corporations doing

business in this state but engaged solely in interstate commerce. . . .

"We are likewise of the opinion that the act clearly, without ambiguity, imposes on foreign and domestic corporations of the classes mentioned, when they are engaged in both intrastate and interstate commerce, for the privilege of engaging in intrastate commerce, a franchise tax measured by or according to their net income, and that the act provides in such cases that income from interstate or foreign commerce shall be included in measuring the tax to the extent limited in the act."

(R. 65, 66, 67.)

It appears unequivocally, therefore, that a foreign corporation doing business in California whose business consists exclusively of interstate commerce is not subject to any tax thereon or measured thereby, whereas another foreign corporation, doing precisely the same character and amount of interstate business, but which does some intrastate business also, is subject to a tax computed not only upon its total income from intrastate business, but in addition, upon part of its income from purely interstate business.

The resulting arbitrary discrimination renders the act void, we submit, both upon the grounds stated above and upon another ground, which is set forth in this court's opinion in *Royster Guano Co. v. Virginia,* 253 U. S. 412. In that case the court had to deal with a Virginia statute which taxed the entire net income of domestic corporations doing some business within the state and some without, but exempted

the income of domestic corporations "which do no part of their business within this State." The statute was held void as a denial of equal protection to corporations doing business both within and without the state.

The situation thus presented is identical with that in the case at bar. The tax in the *Royster* case was void because, as between two corporations similarly situated, it taxed the income of one of them derived from extrastate business but did not tax the income of the other, also derived from extrastate business. In the present case, as between two corporations similarly situated, part of the income of one of them derived from interstate commerce is taxed, but none of the income of the other derived from interstate commerce is taxed.

The provisions of the California statute (Sec. 4), so far as it imposes any tax, are simple, short and (we submit), inseparable:

> "Every financial, mercantile and manufacturing corporation doing business within the limits of this state . . . shall annually pay to the state for the privilege of exercising its corporate franchise within this state a tax according to or measured by its net income. . . ."

Likewise the provisions (Sec. 10), defining the business, to the doing of which the tax applies:

> ". . . if the entire business of such bank or corporation is not done within this state, the tax shall be according to or measured by that portion thereof which is derived from business done within this state."

Stated briefly, these provisions apply, under the decision of the court below, to (a) part of the income of domestic corporations derived from interstate and foreign commerce, and (b) part of the income of foreign corporations derived from interstate and foreign commerce where other and local business is done, but (c) none of the income of foreign corporations from interstate or foreign commerce where no local business is done. The application of the tax to either of the first two classes renders the tax void, not only as a burden on interstate commerce, but also under the equal protection clause.

VI. THE STATE STATUTE, AS INTERPRETED, DEPRIVES APPELLANTS OF THEIR PROPERTY, WITHOUT DUE PROCESS OF LAW.

Again we return to the proposition that the tax can be saved, if at all, only as a charge for the privilege of engaging in local or intrastate business. Appellants have paid, and the controversy does not involve, the statutory percentage of their income from all local or intrastate business (R. 61). They are now called upon to pay, in addition, the same percentage of a part of their income from interstate and foreign commerce—income which has no conceivable relation to the privilege for which the tax is imposed. This exaction is unreasonable, capricious and arbitrary and therefore deprives appellants of their property without due process of law.

Hans Rees' Sons, Inc. v. North Carolina, 283 U. S. 123

It is respectfully submitted that the judgment of the State Supreme Court should be reversed.

Dated, San Francisco, California,
December 23, 1935.

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(Appendix Follows.)

Appendix

PROVISIONS OF STATE CONSTITUTION.

Constitution of California, Article XIII, Section 16.

Notwithstanding any other provision of this Constitution:

1. (a) Banks, including national banking associations, located within the limits of this state, shall annually pay to the state a tax according to or measured by their net income, which shall be in lieu of all other taxes and licenses, state, county and municipal, upon such banks, or the shares thereof, except taxes upon their real property. The amount of the tax shall be equivalent to four per cent of their net income.

(b) The legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof, in lieu of such tax, may provide by law for any other form of taxation now or hereafter permitted by the congress of the United States respecting national banking associations; *provided,* that such form of taxation shall apply to all banks located within the limits of this state.

(c) If it be finally determined that any tax levied upon or respecting any bank, national banking association, or the shares thereof, is invalid, said bank or association, or the shares thereof, shall be reassessed in conformity with any method provided by law. No claim against the state for refund or rebate of taxes paid shall be allowed without first deducting therefrom the amount of any such unpaid reassessment.

2. (a) All financial, mercantile, manufacturing and business corporations doing business within the limits of this state, subject to be taxed pursuant to subdivision (d) of section 14 of this article, in lieu of the tax thereby provided for, shall annually pay to the state for the privilege of exercising their corporate franchises within this state a tax according to or measured by their net income. The amount of such state tax shall be equivalent to four per cent of their net income. Such tax shall be subject to offset, in a manner to be prescribed by law, in the amount of personal property taxes paid by such corporations to the state or political subdivisions thereof, but the offset shall not exceed ninety per cent of such state tax. In any event, each such corporation shall pay an annual minimum tax to the state, not subject to offset, of twenty-five dollars.

(b) The legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof, may provide by law for the taxation by any other method authorized in this Constitution of the corporations, or the franchises, subject to be taxed pursuant to subdivision (a) of paragraph 2 of this section or subdivision (d) of section 14 of this article.

3. The legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof, may change by law the rates of tax, or the percentage, amount or nature of offset provided for in paragraphs 1 and 2 hereof.

4. Notes, debentures, shares of capital stock, bonds, solvent credits, deeds of trust, mortgages, and any

legal or equitable interest therein, of the classes now taxable to the owner thereof and not otherwise taxed under subdivisions (a) or (b) of section 14 or under section 15 of this article, shall be declared in a manner to be prescribed by law and shall be taxed upon their actual value at the rate of three-tenths of one per cent. The legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof, may by law change the rate or rates upon any one or more of the classes of property herein enumerated, provided that no rate shall exceed four-tenths of one per cent. Said tax shall be in lieu of all other property taxes thereon, and the proceeds of said tax shall not go to the state but to such political subdivisions thereof, and in such manner, as may be provided by law.

5. The legislature shall define "corporations" and "doing business"; shall define "net income", and may define it to be the entire net income received from all sources; shall provide for the allocation of income, for the assessment, levy and collection of the aforesaid taxes, and for reassessment in the event of the invalidity of any tax under 2(a) or 2(b) hereof. Said taxes shall become a lien on the first Monday in March of 1929 and of each year thereafter. The legislature shall pass laws necessary to carry out this section. The acts of the forty-eighth session of the legislature passed pursuant to this section shall be effective immediately upon their passage. (New section adopted November 6, 1928.)

Constitution of California, Article XIII, Section 14, Subdivision (d).

All franchises, other than those expressly provided for in this section, shall be assessed at their actual cash value, in the manner to be provided by law, and shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the state.

CALIFORNIA BANK AND CORPORATION FRANCHISE TAX ACT.

Statutes of California, 1929, Chapter 13, page 19, as amended by Statutes of California, 1929, Chapter 781, page 1555.

An act to carry into effect the provisions of section 16 of article thirteen of the constitution of the State of California, relating to bank and corporation taxes.

(Approved by the Governor March 1, 1929. In effect immediately.)

The people of the State of California do enact as follows:

Section 1. Every national banking association located within the limits of this state, shall annually pay to the state a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year. The state is hereby adopting the method numbered (4) authorized by the act of March 25, 1926, amending section 5219 of the Revised Statutes of the United States.

Sec. 2. Every bank, other than a national banking association, doing business within the limits of this state, shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year.

Sec. 3. The tax referred to in sections 1 and 2 hereof shall be in lieu of all other taxes and licenses, state, county and municipal, upon the banks and banking associations therein mentioned, except taxes upon their real property.

Every such bank and banking association shall be entitled to an offset against the tax referred to in sections 1 and 2 hereof, in the manner hereinafter provided, in the amount of ten per centum of taxes paid upon its real property to any county, city and county, city, town, or other political subdivision of the state, but the total offset shall not exceed seventy-five per centum of its total tax levied hereunder.

Sec. 4. Every financial, mercantile, manufacturing and business corporation doing business within the limits of this state, of the classes referred to in subdivision 2(a) of section 16 of article thirteen of the constitution of this state, shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of four per

centum upon the basis of its net income for the next preceding fiscal or calendar year.

Each such corporation shall be entitled to an offset against said franchise tax, in the manner hereinafter provided, in the amount of taxes paid upon its real and personal property to any county, city and county, city, town, or other political subdivision of the state, but the total offset shall not exceed seventy-five per centum of the said franchise tax, and in no case shall the taxpayer be entitled to offset more than ten per centum of its said real property taxes.

In any event, each such corporation shall pay annually to the state, for the said privilege, a minimum tax of twenty-five dollars.

Taxes under this section and under sections 1 and 2 of this act shall accrue on the first day after the close of the "taxable year," as defined in section 11 hereof.

Sec. 5. The term "corporation," as herein used, shall include every financial corporation, other than a bank or banking association, and every mercantile, manufacturing and business corporation of the classes referred to in subdivision one (c) of section 5219 of the Revised Statutes of the United States.

The term "bank," as hereinafter used, shall include national banking associations.

The term "doing business," as herein used, means any transaction or transactions in the course of its business by a corporation created under the laws of this state, or by a foreign corporation qualified to do or doing intrastate business in this state.

Sec. 6. The term "gross income," as herein used, includes gains, profits and income derived from the business, of whatever kind and in whatever form paid; gains, profits or income from dealings in real or personal property; gains, profits or income received as compensation for services, as interest, rents, commissions, brokerage or other fees, or otherwise received in carrying on such business; all interest received from federal, state, municipal or other bonds, and, except as hereinafter otherwise provided, all dividends received on stocks.

Sec. 7. The term "net income," as herein used, means the gross income less the deductions allowed.

Sec. 8. In computing "net income" the following deductions shall be allowed:

(a) All the ordinary and necessary expenses paid or incurred during the taxable year in carrying on business, including a reasonable allowance for salaries or other compensation for personal services actually rendered, and rentals or other payments required to be made as a condition to the continued use or possession for business purposes of property to which the taxpayer has not taken or is not taking title or in which it has no equity.

(b) All interest paid or accrued during the taxable year on indebtedness.

(c) Taxes or licenses paid or accrued during the taxable year, other than taxes paid to the state under this act or under subdivision (d) of section 14 of article thirteen of the constitution of this state, and other than taxes on income or profits paid or accrued

within the taxable year imposed by the authority of (1) any foreign country, (2) any state, territory, county, city and county, school district, municipality, or other taxing subdivision of any state or territory, and other than taxes assessed against local benefits of a kind tending to increase the value of the property assessed, but this shall not exclude the allowance as a deduction of so much of said taxes assessed against local benefits as is properly allocable to maintenance or interest charges; *provided, however,* that the deduction of real and personal property taxes shall be subject to the provisions of section 26 hereof; *and provided, further,* that the deduction allowed for federal income taxes shall be the amount of such taxes accrued during the taxable year.

(d) Losses sustained during the taxable year and not compensated for by insurance or otherwise, except that such losses may, with the consent of the franchise tax commissioner, hereinafter designated "commissioner," be accounted for as of a different period. In the case of any loss claimed to have been sustained in any sale or other disposition of shares of stock or securities where it appears that within thirty days before or after the date of such sale or other disposition, the taxpayer has acquired (otherwise than by bequest or inheritance) or has entered into a contract or option to acquire substantially identical property and the property so acquired is held by the taxpayer for any period after such sale or other disposition, no deduction for the loss shall be allowed unless the claim is made by a taxpayer, a dealer in stocks or securities, and with respect to a transaction made in

the ordinary course of its business. If such acquisition or the contract or option to acquire is to the extent of part only of substantially identical property, then only a proportionate part of the loss shall be disallowed. Upon the subsequent sale or disposition of shares of stock or securities, in respect of which a loss has been disallowed, the basis for measuring gain or loss in the case of the property so acquired shall be the basis in the case of the stock or securities so sold or disposed of, except that if the repurchase price was in excess of the sale price such basis shall be increased in the amount of the difference, or if the repurchase price was less than the sale price such basis be decreased in the amount of the difference.

(e) Debts ascertained to be worthless and charged off within the taxable year, or, in the discretion of the commissioner, a reasonable addition to a reserve for bad debts. When satisfied that a debt is recoverable in part only, the commissioner may allow such debt to be charged off in part. In the case of a debt existing on the date fixed by section 19 hereof for the ascertainment of a gain or loss on the part of the taxpayer, no more than its fair market value on that date shall be deducted.

(f) Exhaustion, wear and tear and obsolescence of property to be allowed upon the basis provided in sections 113 and 114 of that certain act of the congress of the United States known as the "Revenue act of 1928," which is hereby referred to and incorporated with the same force and effect as though fully set forth herein, or upon the basis provided in section 19 hereof.

(g) In the case of mines, oil and gas wells, other natural deposits and timber, a reasonable allowance for depletion and for depreciation of improvements according to the peculiar conditions in each instance, such reasonable allowance in all cases to be made under the rules and regulations to be prescribed by the commissioner.

In the case of leases the deduction shall be equitably apportioned between the lessor and lessee.

The basis upon which depletion is to be allowed in respect of any property shall be as provided in sections 113 and 114 of the said revenue act of 1928, or upon the basis provided in section 19 hereof.

In the case of mines discovered by the taxpayer after February 28, 1913, the basis for depletion shall be the fair market value of the property at the date of discovery or within thirty days thereafter, if such mines were not acquired as the result of purchase of a proven tract or lease, and if the fair market value of the property is materially disproportionate to the cost. The depletion allowance based on discovery value provided in this paragraph shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property upon which the discovery was made, except that in no case shall the depletion allowance be less than it would be if computed without reference to discovery value. Discoveries shall include minerals in commercial quantities contained within a vein or deposit discovered in an existing mine or mining tract by the taxpayer after February 28, 1913, if the vein

or deposit thus discovered was not merely the uninterrupted extension of a continuing commercial vein or deposit already known to exist, and if the discovered minerals are of sufficient value and quantity that they could be separately mined and marketed at a profit.

In the case of oil and gas wells the allowance for depletion shall be 27½ per centum of the gross income from the property during the taxable year. Such allowance shall not exceed 50 per centum of the net income of the taxpayer (computed without allowance for depletion) from the property, except that in no case shall the depletion allowance be less than it would be if computed without reference to this paragraph.

(h) Dividends received during the taxable year from income arising out of business done in this state; but if the income out of which the dividends are declared is derived from business done within and without this state, then so much of the dividends shall be allowed as a deduction as the amount of the income from business done within this state bears to the total business done.

The burden shall be on the taxpayer to show that the amount of dividends claimed as a deduction has been received from income arising out of business done in this state.

(i) In the case of a building and loan association, organized and operating wholly or partly on a mutual plan, the return paid or credited on or apportioned to the withdrawable shares of such association, but not

exceeding the return such shares would receive computed at the average rate paid by all such associations in this state, or by such associations in a particular locality, as the building and loan commissioner of this state may determine, on money borrowed or obtained through the issue during the taxable year of the association of all classes of notes and investment certificates not evidencing any proprietary interest in the association, such rate to be determined by the building and loan commissioner and certified by him to the franchise tax commissioner on or before the fifteenth day of January of each year.

(j) In the case of a mutual savings bank, the entire amount of interest paid to depositors possessing no proprietary interest in the institution or in its surplus, and interest on their deposits to members possessing a proprietary interest in the institution or in its surplus at a rate determined by the state superintendent of banks to be the going rate of interest upon savings deposits in the state during the preceding calendar year, such rate to be certified by him to the commissioner on or before the fifteenth day of January of each year.

(k) In the case of farmers', fruit growers', or like associations organized and operated in whole or in part on a cooperative or a mutual basis, (a) for the purpose of marketing the products of members or other producers, and turning back to them the proceeds of sales, less the necessary marketing expenses, which may include reasonable reserves, on the basis of either the quantity or the value of the products fur-

nished by them; or (b) for the purpose of purchasing, or producing, supplies and equipment for the use of members or other persons, and turning over such supplies and equipment to them at actual cost, plus necessary expenses, all income resulting from or arising out of such business activities for or with their members carried on by them or by their agents; or when done on a nonprofit basis for or with nonmembers.

(l) In the case of other associations organized and operated in whole or in part on a cooperative or a mutual basis, all income resulting from or arising out of business activities for or with their members, or with nonmembers, done on a nonprofit basis.

If any deduction provided for in this section is finally adjudged discriminatory against a national banking association contrary to section 5219 of the Revised Statutes of the United States, or is for any reason finally adjudged invalid, in that event the tax of the favored taxpayer shall be recomputed by the tax commissioner for the taxable year in question, as of the time of the allowance of the deduction, by disallowing the deduction, and any difference between the amount of the tax as recomputed and the amount of the tax as originally computed shall be subject to the provisions hereof relating to original computations.

Sec. 9. In computing net income no deduction shall be allowed for:

(a) Any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property; or for

(b) Any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made; or for

(c) Premiums paid on any life insurance policy covering the life of any officer or employee, or of any person financially interested in any trade or business carried on by the taxpayer, when the taxpayer is directly or indirectly a beneficiary under such policy, but the amount received under such a policy by reason of the death of the insured and amounts received under other life insurance, endowment and annuity contracts of the type whose premiums are disallowed, equal to the total amount of premiums paid thereon shall not be included in gross income.

Sec. 10. If the entire business of the bank or corporation is done within this state, the tax shall be according to or measured by its entire net income; and if the entire business of such bank or corporation is not done within this state, the tax shall be according to or measured by that portion thereof which is derived from business done within this state. The portion of net income derived from business done within this state shall be determined by an allocation upon the basis of sales, purchases, expenses and manufacture, payroll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the state the portion of net income reasonably attributable to the business done within this state and to avoid subjecting the taxpayer to double taxation.

If the commissioner reallocates net income upon his examination of any return, he shall, upon the written request of the taxpayer, disclose to him the basis upon which his reallocation has been made.

Sec. 11. (a) The term "taxable year," as herein used, means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed herein. "Taxable year" includes, in the case of a return made for a fractional part of a year, the period for which such return is made.

(b) The term "fiscal year," as herein used, means an accounting period of twelve months ending on the last day of any month other than December.

(c) The terms "paid or incurred" and "paid or accrued" shall be construed according to the method of accounting upon the basis of which the net income is computed hereunder.

Sec. 12. The net income shall be computed upon the basis of the taxpayer's annual accounting period, fiscal year or calendar year as the case may be, in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of said commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year, or if the taxpayer has no annual accounting period or does not

keep books, the net income shall be computed on the basis of the calendar year.

Sec. 13. Every bank and corporation shall within two months and fifteen days after the close of its taxable year, transmit to the commissioner a return in a form prescribed by him, specifying, for the taxable year, all such facts as he may by rule, or otherwise, require in order to carry out the provisions of this act; *provided,* that there shall be granted a general extension of time of two months in the case of returns required to be filed March 15, 1929, and of one month in the case of returns required to be filed April 15, 1929.

On or before May 15, 1929, every bank or corporation with a fiscal year ended during the calendar year 1928 shall file a return covering such fiscal year, and its tax for the months of the year 1929, corresponding to the months of 1928 which fall within the fiscal year ended during 1928, shall be according to or measured by such proportionate part of the net income of that fiscal year as the number of months falling within the calendar year 1928 bears to the total number of months in the fiscal year ended during that calendar year.

A bank which locates or commences to do business within the limits of this state, and a corporation which commences to do business in this state, after the effective date of this act, shall thereupon prepay the minimum tax hereunder, and upon the filing of its return within two months and fifteen days after the close of its taxable year its tax for that year shall be adjusted upon the basis of the net income received during that taxable year. Said return shall also, in accordance with sections 23 to 26, inclusive, be the basis for the

tax of said bank or corporation for its second taxable year.

Any bank or corporation which is dissolved during any taxable year shall only be obliged to pay a tax hereunder for the months of the taxable year prior to such dissolution according to or measured by such proportionate part of the net income of the preceding taxable year as the number of months of the taxable year during which such corporation is dissolved and prior to such dissolution bears to the entire taxable year. In any event, each such corporation shall pay a minimum tax of twenty-five dollars for such period.

The tax liability imposed under this act shall attach whether a bank or corporation has a taxable year of twelve months or of lesser duration.

Sec. 14. In the case of two or more corporations or banks or of one or more banks and one or more corporations owned or controlled directly or indirectly by the same interests, the commissioner is authorized to distribute, apportion, or allocate gross income or deductions between or among such corporations or banks, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any of such corporations or banks.

An affiliated group of banks or corporations, or of one or more banks and one or more corporations shall, subject to the provisions of this section, have the privilege of making a consolidated return for any taxable year in lieu of separate returns. In the case of a bank or corporation which is a member of the

affiliated group for a fractional part of the year the consolidated return shall include the income of such bank or corporation for such part of the year as it is a member of the affiliated group. As used in this section an affiliated group means one or more banks or corporations connected through stock ownership with a common parent bank or corporation if, at least ninety-five per centum of the stock of each of the banks or corporations, except the common parent bank or corporation, is owned directly by one or more of the other banks or corporations, and the common parent bank or corporation owns directly at least ninety-five per centum of the stock of at least one of the other banks or corporations; or if at least ninety-five per centum of the stock of each of the banks or corporations is owned by the same interests or by the same stockholders. As used in this section the term "stock" does not include nonvoting stock which is limited and preferred as to dividends.

Sec. 15. Every return required by this act to be filed with said commissioner shall be verified by an executive officer of the bank or corporation. Blank forms of return shall be furnished by said commissioner on application, but failure to secure such a form shall not release any taxpayer from the obligation of making a return hereunder.

A reasonable extension of time for filing return may be granted by said commissioner whenever in his judgment good cause exists therefor, and he shall keep a record of every extension and the reason therefor. No such extension or extensions shall aggregate more than ninety days.

Sec. 16. If any return required by this act is not made, the commissioner is authorized to make an estimate of the net income and to compute and levy the amount of tax due under this act from any information in his possession.

Sec. 17. Whenever, in the opinion of the commissioner, the use of inventories is necessary clearly to determine the income of any taxpayer, inventory shall be taken by such taxpayer upon such basis as the commissioner may prescribe, conforming as nearly as may be to the best accounting practice and most clearly reflecting the income.

Sec. 18. Any bank or corporation failing or refusing to furnish any return hereby required to be made, or failing or refusing to furnish a supplemental return or other data required by the commissioner, or rendering a false or fraudulent return, shall be guilty of a misdemeanor and subject to a fine of not exceeding five thousand dollars ($5000) for each such offense.

Any person required to make, render, sign, or verify any report, as aforesaid, who makes any false or fraudulent return, with intent to defeat or evade the assessment required by law to be made, shall be guilty of a misdemeanor, and shall for each such offense be fined not less than three hundred dollars ($300) and not more than five thousand dollars ($5000), or be imprisoned not exceeding one year in the county jail of the county where said return was verified, or be subject to both said fine and imprisonment, in the discretion of the court.

Sec. 19. For the purpose of ascertaining the gain derived or loss sustained from the sale or other disposi-

tion of property, real, personal or mixed, acquired on or after January 1, 1928, the basis shall be the cost thereof, or the inventoried value if the inventory is made in accordance with this act, and in the case of property acquired prior to January 1, 1928, and disposed of thereafter, the basis shall be the fair market value thereof as of said date.

The basis shall be diminished by the amount of the deductions for exhaustion, wear and tear, obsolescence and depletion which have, since the basic date, been allowable in respect of such property under this act.

Sec. 20. Upon the sale or exchange of property the entire amount of the gain or loss, determined under the preceding section shall be recognized, with the exceptions provided for in section 112 of said "Revenue act of 1928," which are hereby referred to and incorporated with the same force and effect as though fully set forth herein.

In the case of installment sales the taxpayer may elect to proceed in the manner provided in section 44 of the said revenue act of 1928, in which case the taxpayer shall account for profits on installments received subsequent to December 31, 1927, on sales made prior thereto. If the taxpayer elects to proceed otherwise, the transaction will be deemed to have been closed when the sale was made.

Sec. 21. When property is exchanged for other property and no gain or loss is recognized under the provisions of the preceding section, the property received shall be treated as taking the place of the property exchanged therefor.

Sec. 22. The franchise tax commissioner, herein referred to, shall be appointed by the director of the department of finance, the controller of the state and the chairman of the state board of equalization, who are authorized to provide him with such assistants as they may deem necessary, and he shall serve for such period, and for such compensation, and under such conditions, as they may prescribe.

He shall have power, and it shall be his duty, to administer this act, and to prescribe all such rules and regulations as are necessary and reasonable to carry out its provisions; and said commissioner and the state board of equalization, for the purpose of administering their duties under this act, each shall have the powers conferred upon said board by section 3669e of the Political Code of this state.

Sec. 23. One-half the amount of tax disclosed by the return, after allowing the offset herein provided for, shall be due and payable on or before the fifteenth day of the third month following the close of the taxable year, as defined in section 11 hereof. The balance of the tax shall be due and payable on or before the fifteenth day of the ninth month following the close of the taxable year. A tax imposed by this act or any installment thereof may be paid at the election of the taxpayer, prior to the date prescribed for its payment.

Where an extension of time for filing returns has been granted by the commissioner under the provisions of section 15 of this act, the first installment shall be paid prior to the expiration of such extension.

If one-half of the tax is not paid on or before its due date, or the due date as extended by the commissioner, it shall be delinquent and a penalty of fifteen per centum added thereto. If the balance is not paid at the time it is due and payable, it shall be delinquent and a penalty of five per centum added thereto. At the time of the delinquency of the second installment an additional penalty of five per centum shall be added to the first installment unless that installment has theretofore been paid.

All taxes and interest imposed under this act must be paid to the commissioner at Sacramento in the form of remittances payable to the treasurer of the State of California, and he shall transmit said payments daily to the state treasurer. All moneys received by the state treasurer shall be deposited by him in a special fund in the state treasury, to be designated the bank and corporation franchise tax fund, and moneys in said fund shall, upon the order of the state controller, be transferred into the general fund of the state, or drawn therefrom for the purpose of refunding to taxpayers hereunder.

Sec. 24. (a) Interest upon the amount determined as a deficiency under the provisions of section 25 of this act shall be assessed at the same time as the deficiency, shall be paid upon notice and demand from the commissioner, and shall be collected as a part of the tax, at the rate of six per centum per annum from the date prescribed for the payment of the tax (or, if the tax is paid in installments, from the date prescribed for the payment of the first installment) to the date the deficiency is assessed.

(b) If the time for the payment of the tax or any installment thereof has been extended, under the provisions of section 23 of this act, there shall be collected as part of such tax, interest thereon at the rate of six per centum per annum from the date when such payment should have been made if no extension had been granted, until the expiration of the period of the extension.

(c) If the amount determined by the taxpayer as the tax imposed by this act, or any installment thereof, or any part of such amount or installment is not paid on or before the date prescribed for its payment, there shall be collected as a part of the tax, interest upon such unpaid amount at the rate of one per centum a month from the date prescribed for its payment until it is paid.

(d) Where an extension of time for payment of the amount so determined as the tax by the taxpayer, or any installment thereof, has been granted, and the amount the time for payment of which has been extended, and the interest thereon determined as provided hereinabove, is not paid in full prior to the expiration of the period of the extension, then, in lieu of the interest provided for in subsection (b) of this section, interest at the rate of one per centum a month shall be collected on such unpaid amount from the date of the expiration of the period of the extension until it is paid.

(e) Where a deficiency, or any interest or penalties assessed under this act have not been paid in full within ten days from the date of notice and demand

from the commissioner, there shall be collected as part of the tax, interest upon the unpaid amount at the rate of one per centum a month from the date of such notice and demand until such assessment is paid.

Sec. 25. As soon as practicable after the return is filed the commissioner shall examine it and shall determine the correct amount of the tax. If the commissioner determines that the tax disclosed by the original return is less than the tax disclosed by his examination he shall mail notice to the taxpayer at its post-office address (which must appear on its return) of the aditional tax proposed to be assessed against it. Such notice shall set forth the details of the proposed additional assessment and of computing said tax.

Within sixty days after the mailing of said notice the taxpayer may file with the commissioner a written protest against the levy of the proposed additional tax, as computed by the commissioner, specifying therein the grounds upon which the protest is based. The protest must be under oath.

If no such protest is so filed the amount of the tax shall be final upon the expiration of said sixty-day period. If a protest is so filed it shall be the duty of the commissioner to reconsider the computation and levy of the tax complained of, and if the taxpayer has so requested in its protest, it shall be the duty of the commissioner to grant said taxpayer, or its authorized representatives, an oral hearing. After consideration of the protest and the evidence adduced in the event of such oral hearing, the commissioner's action upon the protest shall be final upon the expiration of thirty

days from the date when he mails to the taxpayer notice of his action, unless within that thirty-day period the taxpayer appeals in writing from the action of the commissioner to the state board of equalization. The appeal must be addressed and mailed to the state board of equalization at Sacramento, and a copy of the appeal addressed and mailed at the same time to the commissioner at Sacramento. The determination by said board upon said appeal of the amount of the tax shall be final, and said board shall forthwith notify the taxpayer and the commissioner of its determination.

When a deficiency has been determined and the tax has become final under the provisions of this section, the commissioner shall mail notice and demand to the taxpayer for the payment thereof, and such tax shall be due and payable at the expiration of ten days from the date of such notice and demand.

A certificate by the commissioner or of said board as the case may be, of the mailing of the notices specified in this section shall be prima facie evidence of the computation and levy of the deficiency in tax and of the giving of said notices.

Sec. 26. A corporation subject to the tax herein provided for, shall receive an offset against said tax, subject to the limitations provided in section 4 hereof, for real and personal property taxes paid upon its property to any county, city and county, city, town or other political subdivision of the state during the taxable year. Every bank and banking association subject to the tax herein provided for shall receive

an offset against said tax, subject to the limitations provided in section 3 hereof, for taxes paid upon its real property during the taxable year to any county, city and county, city, town, or other political subdivision of the state. At the time of payment of first installment of tax under the provisions of section 23 of this act, each taxpayer claiming an offset against the tax shall submit to the commissioner evidence in such form as he shall prescribe in support of such claims.

Where a consolidated return has been made under section 14 hereof the offset allowable against the tax liability of the consolidated group may include said property taxes paid during said period by all corporations which are included in the consolidated group, subject to the limitations of section 4 hereof.

If a corporation in paying the tax provided for in this act desires to claim an offset in the computation of its tax, the four per centum rate shall be applied to such offset and the amount so computed shall be added to and included in the tax of the corporation.

Sec. 27. If in the opinion of the commissioner, or said board, as the case may be, a tax has been computed in a manner contrary to law or has been erroneously computed by reason of a clerical mistake on the part of the commissioner or said board, such fact shall be set forth in the records of the commissioner, and the amount of the illegal levy shall be refunded to the taxpayer or its successor through reorganization, merger, or consolidation, or to stockholders upon dissolution.

If any tax or penalty has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, the commissioner shall certify to the state board of control the amount collected in excess of what was legally due, from whom it was collected, or by whom paid, and if approved by that board, the same shall be refunded to the taxpayer, but no such refund shall be made unless a claim therefor is filed by the taxpayer with the commissioner.

Interest on refunds shall be allowed and paid at the rate of six per centum per annum from the date of the overpayment to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the commissioner.

In the event that a tax has been illegally levied against a taxpayer the commissioner shall certify such fact to the state board of control and said board shall authorize the cancellation of the tax upon the records of the commissioner.

Sec. 28. In the event that fraud or evasion on the part of a taxpayer is discovered by the commissioner, he shall have the power and it shall be his duty to determine the extent to which the state has been defrauded and to compute and charge against the taxpayer a tax in that amount which shall be immediately due and payable.

Sec. 29. The taxes levied under this act shall constitute a lien upon all property of the taxpayer, which lien shall attach on the first Monday of March of each year. Every tax herein provided for has the effect

of a judgment against the taxpayer, and every lien has the effect of an execution duly levied against all property of the delinquent, and the judgment is not satisfied nor the lien removed until the tax and the penalty are paid, or the property sold for the payment thereof. No decree of dissolution shall be made and entered by any court, nor shall the county clerk of any county or the secretary of state file any such decree, or file any other document by which the term of existence of any taxpayer shall be reduced or terminated until the tax and penalty shall have been paid.

Sec. 30. Any taxpayer claiming that the tax computed and levied against it is void in whole or in part may pay its tax under protest and bring an action against the state treasurer for the recovery of the whole or any part of the amount paid. The protest must be in writing and must state the grounds upon which the claim is founded. Such action must be filed within ninety days from the date of mailing the notice of final determination of the tax under section 25 hereof; *provided,* that no action shall be filed unless the taxpayer has made protest to the commissioner of the computation and levy complained of under the provisions of section 25 hereof.

When a refund claim has been filed under the provisions of section 27 hereof, and the same has been denied or no action thereon has been taken by the commissioner within six months from the filing thereof, the taxpayer may bring an action against the state treasurer on the grounds set forth in such claim for

the recovery of the whole or any part of the amount claimed as an overpayment, but such action must be brought within ninety days from the date of the commissioner's final action upon such claim.

Whenever under the provisions of this section an action is commenced against the state treasurer, a copy of the complaint and the summons must be served upon the treasurer, or his deputy. At the time the treasurer demurs or answers, he may demand that the action be tried in the superior court of the county of Sacramento, which demand must be granted. The attorney general must defend the action. The provisions of the Code of Civil Procedure, relating to pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for. A failure to begin such action within the time herein specified shall be a bar against the recovery of such taxes. In any such action the court shall have power to render judgment for plaintiff for any part or portion of the tax, interest, penalties or costs found to be void and so paid by plaintiff upon such assessment.

In any judgment of any court rendered for any overpayment in respect of any tax imposed by this act, interest shall be allowed at the rate of six per centum per annum upon the amount of the overpayment, from the date of the payment or collection thereof to a date preceding the date of the refund warrant by not more than thirty days, such date to be determined by the commissioner.

Sec. 31. At any time within a year after the delinquency of any tax, or any installment thereof, the

controller of the state may bring an action in a court of competent jurisdiction in the county of Sacramento in the name of the people of the State of California to collect the amount delinquent, together with penalties. The attorney general must prosecute such action, and the provisions of the Code of Civil Procedure, relating to service of summons, pleadings, proofs, trials, and appeals are applicable to the proceedings herein provided for. In such action a writ of attachment may be issued, and no bond or affidavit previous to the issuing of said attachment is required. In such action a certificate by the commissioner or by the controller showing the delinquency shall be prima facie evidence of the levy of the tax, of the delinquency and of compliance by the commissioner and the state board of equalization with all the provisions of this act in relation to the computation and levy of the tax.

Sec. 32. If a tax computed and levied hereunder is not paid before six o'clock p. m. on the last day of the twelfth month after the date of delinquency of the first installment thereof, the corporate powers, rights and privileges of the delinquent taxpayer, if it be a domestic corporation, shall be suspended, and if the delinquent taxpayer be a foreign corporation it shall thereupon forfeit its right to do intrastate business in this state.

The controller shall transmit the name of each such corporation to the secretary of state, who shall immediately record the same in such manner that it may be available to the public. The suspension or for-

feiture herein provided for shall become effective immediately such record is made, and the certificate of the secretary of state shall be prima facie evidence of such suspension or forfeiture.

Any person who attempts or purports to exercise any of the rights, privileges or powers of any such domestic corporation, or who transacts or attempts to transact any intrastate business in this state in behalf of any such foreign corporation shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than two hundred fifty dollars and not exceeding one thousand dollars, or by imprisonment in the county jail not less than fifty days or more than five hundred days, or by both such fine and imprisonment. The jurisdiction of such offense shall be held to be in any county in which any part of such attempted exercise of such powers, or any part of such transaction of business occurred. Every contract made in violation of this section is hereby declared to be voidable.

Sec. 33. Any corporation which has suffered the suspension or forfeiture referred to in the preceding section may be relieved therefrom upon making application therefor in writing and paying the tax and the interest and penalties for nonpayment of which the suspension of forfeiture occurred. Application for revivor may be made by any stockholder or creditor of the corporation or by a majority of the surviving trustees or directors, and the same shall be filed with the state controller. In case the application is made in any taxable year other than the taxable

year in which the suspension or forfeiture occurred the applicant shall pay twice the amount of the tax and penalties due the state for the taxable year in which the suspension or forfeiture occurred, and upon such payment the controller shall issue a certificate of revivor and thereupon the applicant shall be revived. The revivor shall be without prejudice to any action, defense or right which has accrued by reason of the original suspension or forfeiture. The certificate of revivor shall be prima facie evidence of the revivor. Any certificate provided for in this section may be recorded in the office of the county recorder in any county of this state.

In case any corporation has adopted subsequent to such suspension or forfeiture any name so closely resembling the name of such reviving corporation as will tend to deceive, then such reviving corporation shall be entitled to a certificate of revivor pursuant to the terms of this section only upon the adopting by such corporation seeking revivor of a new name, and in such case nothing in this section contained shall be construed as permitting such reviving corporation to carry on any business under its former name. Such reviving corporation shall have the right to use its former name or take such new name only upon filing an application therefor with the secretary of state, and upon the issuing of a certificate to such corporation by the secretary of state, setting forth the right of such corporation to take such new name or use its former name as the case may be. The secretary of state shall not issue any certificate permitting any

corporation to take or use the name of any corporation heretofore organized in this state and which has not suffered a forfeiture under either of the acts in this section first above mentioned, or to take or use a name so closely resembling the name of any corporation heretofore organized in this state as will tend to deceive.

Sec. 34. If any tax hereunder is finally adjudged illegal in whole or in part, it shall be the duty of the commissioner, and he shall have the power, to cause the tax to be recomputed for and as of the taxable year for which the illegal tax was computed; and the provisions hereof relating to original computations shall apply to the tax as recomputed.

Sec. 35. It shall be unlawful for the commissioner or any member of the state board of equalization, or the state controller, or any person having an administrative duty under this act to divulge any information concerning the business affairs of banks or corporations reporting hereunder; *provided, however,* that the governor may authorize examination of such returns by other state officers, in which event the information obtained shall not be made public; *provided, further,* that such returns may be examined, with the consent of the governor, by tax officers of another state or the federal government, if a reciprocal arrangement exists.

Any violation of the provisions of this section shall be a misdemeanor punishable by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months, or both.

Sec. 36. Upon the request of a taxpayer under this act, it shall be the duty of the tax-collecting officer of a county, city and county, city, town, or other political subdivision of this state, to furnish an official receipt for real and personal property taxes paid to him setting forth a description of such property, the assessed valuation thereof, the rate of tax, the amount of taxes paid, and the beginning and ending of the year for which the taxes are paid.

Sec. 37. This act shall be known as the Bank and Corporation Franchise Tax Act.

Sec. 38. If any portion in this act is invalid the Legislature hereby declares that had it known of the invalidity of the portion at the time of this enactment it would have passed the remainder of this act without the invalid portion, and that it is the intention of the Legislature that the remainder of this act operate in the event of the invalidity of any portion of this act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1935.

No. 346.

MATSON NAVIGATION COMPANY (a corporation), THE OCEANIC STEAMSHIP COMPANY (a corporation), and MATSON TERMINALS, INC. (a corporation), *Appellants*,

v.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, H. G. CATTELL and RAY L. RILEY, the Members of Said State Board of Equalization, and CHARLES J. McCOLGAN, Franchise Tax Commissioner of the State of California, *Appellees*.

REPLY TO BRIEF OF APPELLEES.

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REPLY TO BRIEF OF APPELLEES.

I.

THE NATURE OF THE TAX.

(Brief of Appellees, pp. 1-13)

The brief for appellees suggests a novel contention with respect to the nature of the tax in dispute. Without explicit statement, it suggests that the tax has some analogy to a tax on property. We say that this suggestion is novel

because it flies in the face of the statutory language, of the decision of the State Supreme Court and of the actual incidence and operation of the tax. The suggestion is as false as it is novel. To show its groundlessness, a brief reference to the history of corporate taxation in California will be helpful.

The Taxation of Corporations prior to 1928 and the Change in the Character of Corporate Taxation Proposed at that Time.

Prior to 1910 all corporate property, tangible and intangible, was assessed by the local taxing authorities for both State and local purposes. In November, 1910, an amendment to the State Constitution (often referred to as Amendment Number One) was adopted as Section 14 of Article XIII. Under this Amendment the operative property of public utilities was withdrawn from local taxation and State taxes were imposed on the utilities, measured by varying proportions of their gross receipts. It was this tax upon public utilities which came before this Court in *Pullman Company* v. *Richardson,* 261 U. S. 330, where the tax was said to be a tax according to the value of the property. In that case this Court said:

> "The provisions under which the tax is imposed call it a property tax, specify the property subjected to it, and declare that it is in lieu of all other taxes on such property. The Supreme Court of the State holds it is a tax on the property specified."

The Amendment of 1910 also imposed a tax of 1.5 per cent on the gross premiums of insurance companies, but such companies were to continue to pay their local taxes on real estate and could use such real estate taxes to offset the State taxes. The Amendment also imposed a tax on the shares of capital stock of banks. Finally, the Amendment imposed a one per cent tax on the "franchises" of all corporations other than public utility corporations, banks and insurance

companies. This latter provision was embodied in Section 14 (d), Article XIII, reading as follows:

> "All franchises other than those expressly provided for in this Section, shall be assessed at their cash value, in the manner to be provided by law, and shall be taxed at the rate of one per centum each year, and the taxes collected thereon shall be exclusively for the benefit of the State."

In 1927 a crisis arose as the result of claims made and fears entertained that the tax on national banks, imposed by Section 14, Article XIII, was invalid because of its failure to comply with Section 5219 of the Revised Statutes of the United States. In this emergency the Legislature of the State provided for the appointment of the California Tax Commission. This Commission, by its report of August 10, 1928, recommended that the Constitution be amended to provide for a tax on banks, including national banks, "according to or measured by their net income," as permitted by the amended provisions of Section 5219 of the Revised Statutes; and to provide that other non-utility corporations should pay "for the privilege of exercising other corporate franchises within this State, a tax according to or measured by their net income." The bank tax and the general corporate tax were to be measured by the same rate of four per cent of the net income. In this way the State might be enabled to comply with the requirements of Section 5219 that the rate of tax upon national banking associations "shall not be higher than the rate assessed upon other financial corporations nor higher than the highest of the rates assessed by the taxing State upon mercantile, manufacturing and business corporations doing business within its limits." It was also recommended that provision be made for the taxation of intangible property.

Pursuant to these recommendations the legislative proposed, and the people of the State adopted on November 6, 1928, the Amendment adding Section 16 of Article XIII

of the Constitution. This Amendment is set forth at length on pages 1-3 of the appendix to our brief.

The report of the California Tax Commission of August 10, 1928, sets out clearly and definitely the nature of the old tax assessed against corporations under Article XIII, Section 14 (d), and the radically different nature of the new tax proposed to be assessed. In this respect the Tax Commission said:

> "The present franchise tax is a misnomer. It is really a 'corporate excess' tax (Miller and Lux, Inc. v. Richardson, 182 Cal. 115). It was established in its present form, except as to rate, in 1910, through the passage of Amendment Number One."
>
> *Final Report of the California Tax Commission—Submitted March 5, 1929, p. 265.*

The accuracy of the Commission's statement is fully established by the case cited, *Miller and Lux, Inc.* v. *Richardson,* 182 Cal. 115. That case held that the 1910 Amendment did nothing more than transfer to the State authorities the power, theretofore exercised by local authorities, to levy a property tax upon the whole corporate excess. The method of assessment ordinarily employed was to ascertain the value of the excess by deducting the assessed value of the corporate tangible property from the value of all outstanding corporate securities.

The Tax Commission found that the results obtained from this property taxation had been unsatisfactory. In this respect, the Commission said:

> "It is clear, then, that the practice of taxing corporate excess under the title of a franchise tax is one of long standing in California. The numerous complaints which this Commission has received indicate, however, that the hope of the 1910 Commission that the transfer of the administration of this tax from the local assessors to the State Board of Equalization would result in 'certainty and uniformity,' has not been completely fulfilled. The evidence before the Commission indi-

cates that, from the point of view of the taxpayer, the present franchise tax is an arbitrary tax, the amount of which it is impossible to anticipate and accrue. The taxpayers complain that they are unable to secure any explanation as to the basis on which the assessments are made, although it is generally understood that the underlying procedure is primarily that of the old corporate-excess method. Gauged as a device in a general property tax system designed to supplement local assessments of tangible property, the present franchise tax appears to be open to criticism, both because, if it succeeds in attaining its object, it is unjust, and because it does not succeed in attaining its object.

The trend in modern tax reform is distinctly away from the theory of the general property tax. Tangible property, or at least land and buildings, will doubtless continue to be taxed where located and without deduction for debts. In addition to such property taxation, there is rapidly being developed a system of business taxes imposed where the business activity is carried on, and measured by the earnings of the business or by some approximation thereto. In connection with its statistical study, the results of which are set forth later in this report, the Commission's technical staff has subjected the present franchise tax to an exhaustive test with respect to its inadequacy as a modern business tax, and measured by this test, as will be seen from the figures there presented, it is without merit."

Final Report of California Tax Commission, submitted March 5, 1929, pages 266-267.

The report of the Commission shows, beyond any possibility of doubt, that it realized that its proposal involved a complete departure from the old theory of property taxes and the substitution of a new theory of business taxation, as far as banks and business corporations were concerned. After the adoption of the Constitutional Amendment of 1928, the Commission, in its final report, said:

"In August of 1928, this Commission made a special report recommending that banks and ordinary business corporations be subjected to a new franchise tax, to be 'measured by or according to net income' at the rate

of 4 per cent. This tax was to be in substitution for the then existing taxes on bank shares and on the franchises of business corporations. This recommendation, which was adopted by the legislature in September and by the people in November, was prompted by the apparent illegality of the bank share tax. The details of this change are discussed elsewhere. The action taken may prove to be of great significance, however, as the first departure from the general theory of Amendment Number One that property should be the fundamental test of the adequacy of all business taxation in California."

Final Report of the California Tax Commission, submitted March 5, 1929, page 41.

Again, discussing more comprehensively the theory of State taxation, the Commission, in its final report, said:

"The adoption of Amendment Number One, in 1910, was clearly a recognition of the complete failure of the old general property tax and an effort to establish in its place an objective property tax. The gross receipts taxes on utilities and the special taxes on banks, insurance companies and corporate franchises were justified as covenient and approximately accurate methods of reaching the property values of the corporations of these different types. The Commission found the 1910 plan, so far as it applied to banks, to be wrecked on legal rocks. It found the 1910 plan, so far as it applied to the franchises of ordinary business corporations, to be discredited. It found the 1910 plan, so far as it applied to public utilities, to be so faulty as to render its continuance undesirable. It found the 1910 plan, so far as it applied to personal property, to be a farce. It found that the 1910 plan made real estate the residuary legatee of the troubles generated by the failure of the other portions of the system.

Forced to consider the bank tax problem as an emergency of pressing importance, it recommended in a special report that the bank-share tax which had been established in 1910 be abolished and that instead the banks be subjected to a business tax 'measured by or according to' their net income. This action involved substituting a similar tax upon business corporations

generally in place of the old 1910 franchise tax. It recommended also that foreign securities and solvent credits be taxed at a low flat rate. It defended these recommendations not only on the ground that the changes were necessary to meet an emergency, but also on the ground that they would harmonize with the general plan for recasting the tax system of the state which the Commission would later submit.

What should this new general plan be? Should an effort be made to turn back the hands of the clock and revert to the old general property tax which had been abandoned as obsolete two decades ago? Nothing in the experience of other states indicates that there is any hope of salvation in such a course. On the contrary, development elsewhere is distinctly away from the deceptively simple property tax as an ideal of state taxation and toward a more diversified plan.

This plan, the Commission believes, should ultimately consist of three distinct but complementary elements: First, a property tax of reduced scope; second, a business tax upon all business activities carried on within the borders of the state; and, third, a personal tax levied upon all residents of the state.

The acceptance of such a plan involves the abandonment of the traditional assumption which nominally underlies the tax system at the present time, namely, that the sole test of equity in taxation is property values. It involves the abandonment of the attempt to use the property tax for purposes to which it is not well adapted."

Final Report of the California Tax Commission, submitted March 5, 1929, pages 74-75.

After referring to a proposal to return the real estate of the public utilities of the counties for inclusion in the local tax base, the Commission recurs to the fundamental theory of business taxes, as contrasted with property taxes, in the following language of its report:

"One of the three major elements of the proposed new tax system for California consists of a series of taxes on business. At the present time California has a number of levies which are essentially business taxes,

but they are camouflaged as property taxes or taxes in lieu of property taxes. It is proposed to recognize these levies as true business taxes, refine them and relate them systematically to each other. It is hoped that when this reorganization is complete, the business men of California can rest assured that the tax system imposes no discriminations as among businesses and inflicts no significant competitive disadvantage upon any one class of business endeavor. It is hoped that the reorganized system will enable the people of the state to make clear-cut and intelligent decisions as to the extent they desire to impose taxes upon business as such, as contrasted with persons and property.

The case in favor of business taxation has been well stated by Professor T. S. Adams in the following paragraphs:

> The strongest reason for the retention and perfection of business taxation is found in experience and fiscal history. Business taxes are as old as business history. They are all but universal throughout the world and show no tendency to disappear with the passage of time. * * *
>
> From political and moral standpoints, the justification of this great class of taxes is plain. A large part of the cost of government is traceable to the necessity of maintaining a suitable business environment. * * * The industry which does not pay its due share of public expense is generally a source of weakness and not a source of strength.
>
> Finally, taxes on business have great fiscal virtue as such. They are relatively inexpensive to collect and comparatively productive in yield.
>
> ('The Taxation of Business,' Proceedings, National Tax Association, 1917, pages 186-187.)

With respect to the base which should be used in measuring liability for business taxes, the same authority says:

> There is no perfect measure of any tax. Net income is not a perfect measure. But it is a better measure than gross income. * * * I have had some experience with a highly classified business tax. I have

no hesitation in stating that the legislative task of differentiating the rates, together with the subsequent administrative task of locating each industry in its proper place, raises more and more difficult problems than are raised by the net income tax. In the long run the net income tax is the simpler; it wears better.

Moreover, classified business taxes almost always look up to the net income tax as their final goal and approach it more closely year by year. (Ibid., page 190.)

Final Report of the California Tax Commission, March 5, 1929, p. 76.

The Commission then points out that the taxes upon banks and corporations, which were provided for by the Amendment of November 1928, were based on this theory of substituting business taxes for property taxes. In this respect the Commission says:

"The recommendations of this Commission in its special report of August 10, 1928, which bore fruit in the constitutional amendment adopted in November, 1928, were defended before the legislature and before the people not merely on the ground that the suggested course of action represented the only available solution under the circumstances, but also on the ground that they would establish a modern and desirable method of taxing corporations."

Final Report of the California Tax Commission, Submitted March 5, 1929, p. 76.

Then, after quoting the language of Section 16 of Article XIII as adopted November 6, 1928, the Commission summarizes the change made as follows:

"At this point comment will be restricted to the provision for taxes on banks and corporations. The sections dealing with foreign securities and solvent credits will receive attention in another section. In general the new tax on banks and corporations is a charge imposed upon the privilege of doing business in Califor-

nia, the measure of the value of the privilege being the record of earnings established during the previous year. In the opinion of the Commission this measure furnishes the foundation for a comprehensive and equitable system of business taxes in the state. This portion of the structure of the proposed new tax system can be accepted as being well along toward completion."

Final Report of the California Tax Commission, March 5, 1929, p. 78.

See also the historical statement in

The Pacific Company, Ltd. v. *Johnson*, 212 Cal. 148.
Pacific Company, Ltd. v. *Johnson*, 285 U. S. 480.

The Nature of the Tax as Shown by the Language of the Constitution and the Statute.

Neither the Constitution nor the statute contains the slightest indication that the tax under discussion is a property tax, or is in the nature of a property tax, or is intended to be measured by property values. On the contrary, the Constitution declares that the corporations involved shall pay "for the privilege of exercising their corporate franchises within this State a tax according to or measured by their net income."

Constitution of California, Article XIII, Section 16, Subdivision 2 (*a*), Appendix to Brief for Appellants, page 2.

Likewise the statute declares that each corporation involved "shall annually pay to the State, for the privilege of exercising its corporate franchise within this State, a tax according to or measured by its net income."

The California Banking Corporation Franchise Tax Act, Sec. 4, Statutes of California, 1929, page 19, Appendix to Brief for Appellants, page 5.

Language could not be more explicit to negative any intention to tax property or property value. On the face of the statute the tax is an excise and nothing more.

The Nature of the Tax as Shown by the Decisions of the State Supreme Court.

Every decision of the Supreme Court of California which has involved the tax is to the effect that it is not a property tax, or one measured by the value of property, but that it is on the contrary an excise tax on business.

Such is the necessary effect of the *Pacific Company, Ltd.* v. *Johnson,* 212 Cal. 148, which held that income from tax exempt bonds might be included in the measure of the tax. If the tax had been a property tax, it could not have been applied to the bonds in question. But the Supreme Court of the State said in so many words: "The tax is not a property tax."

The Pacific Co., Ltd. v. *Johnson,* 212 Cal. 148, 158.

It likewise appears from *Union Oil Associates* v. *Johnson,* 2 Cal. (2nd) 727, that the State Supreme Court considers the tax to be an excise tax and not a property tax or in the nature of a property tax. In that case the tax on banks, expressed in identical statutory language, was specifically described as a "state excise tax."

Union Oil Associates v. *Johnson,* 2 Cal. (2nd), 727, 734.

And in the present case the opinion of the State Supreme Court does not contain the slightest suggestion or hint that the tax is one on property or according to the value of property. To the contrary, the Court says:

> "We emphasize the fact that the act here involved imposes a tax on a corporation 'for the privilege of exercising its corporate franchise within this state'."

Matson Navigation Co. v. *State Board,* 43 Pac. (2nd), 805, 810.

The cases relied upon by Appellees do not apply.

We have here a situation where the state formerly imposed a property tax on the corporate excess, and where (at least as to the class of corporations here involved) it consciously abolished and rejected this property tax on the corporate excess and provided instead for (1) a continuance of the ordinary property taxes on the tangible property of the corporation and (2) an excise tax on the doing of business by the corporation, measured by net income.

To such a situation the cases cited on page 10 of the brief of appellees can have no possible application. Extended analysis of these cases would be superfluous. It will suffice to refer to the two most recent, *Pullman Company* v. *Richardson,* 261 U. S. 330, and *Cudahy Packing Company* v. *Minnesota,* 246 U. S. 450. Under these cases if a tax on a utility is declared to be a property tax by Legislature and Courts, if it is intended to be measured by the actual value of the property, although otherwise then by direct assessment, if its rate is not higher than the rate of taxation on other property and if, finally, it is imposed in lieu of all other taxes, then if may, under these decisions, be considered as being substantially a property tax. But in order that this rule should apply, it must appear that the method used is such as to result in the ascertainment of the real value with at least approximate accuracy. *Union Tank Line Co.* v. *Wright,* 249 U. S. 275, 283. These conditions must concur in order that the tax be treated as a property tax. It is obvious that none of them exist in the present case, and we submit that the argument of appellees on this point is without foundation. There is no warrant for the suggestion, implied in their brief, that a tax which burdens interstate commerce in its actual operation is rendered innocuous because of the mere fact that it was imposed "in lieu of" another wholly different kind of tax which was valid.

A tax imposed, not in lieu of all property taxes, but in lieu of all other franchise taxes, is not to be deemed a property tax where it does appear that the tax is measured by the value of property.

New Jersey Bell Telephone Co. v. *State Board of Taxes*, 280 U. S. 338.

A determination of real value with fair accuracy is essential, in order that the tax may be considered as in the nature of a property tax.

Alpha Portland Cement Co. v. *Massachusetts*, 268 U. S. 203.

Schwab against Richardson, 263 U. S. 88, 188 Cal. 27, is not in point for many reasons. In the first place it was a tax on the property value of the corporate excess and the right to be, under the old system of corporate taxation. The accuracy of the valuation of the property was admitted by the pleadings. Obviously, the tax was thereby shown to be good. The case has no application to an excise tax on the doing of business or on the right to do business.

When appellees state (at page 5 of their brief) that the new tax "was in lieu of property taxes upon the corporation subject hereto" they are merely stating their contention that the present excise tax on business took the place of the old property tax on the corporate excess. The direct property taxes on the tangible property of non-utility corporations have always remained in force and the new taxes are not "in lieu" thereof.

Section 1 of Article XIII of the Constitution of California, quoted at pages 7-8 of appellees brief is, of course, subject to the effect of later amendments on the subject of taxation, and is subject, particularly, as far as the taxation of these appellants is concerned, to the later and controlling provisions of Subdivision 2 (a) of Article XIII, Section 16.

Section 3664 (d) of the Political Code of California, quoted at pages 8-9 of the brief of appellees, refers to the old system of property valuation of the corporate excess, and not at all to the substituted and different method of taxation involved in the present case.

Counsel for appellees contend that corporations not engaged in business remained, after 1929, subject to the old corporate excess tax. This may have been true, although the point has not been passed upon directly by the State Courts. In view of the adoption of the new and superseding system of corporate taxation, the attempt to levy taxes on the corporate excess was in practice abandoned and finally, in 1933, Section 4 of the Bank and Corporation Franchise Tax Act was amended so as to declare that corporations which were not doing business but which were subject to the provisions of Article XIII, Section 14 (d), should pay only the minimum annual fee of $25.00. The Supreme Court of the State has held that certain other amendments to Section 4, made at the same time, were merely declaratory and clarifying.

Union Oil Association v. *Johnson,* 212 Cal. (2nd), 727.

II.

THE SUBJECT OF THE TAX.

(Brief of Appellees, pages 13-21)

Counsel for appellees refer to fact that the Act purports to impose the tax "for the privilege of exercising * * * corporate franchises"; and they say that appellants had many privileges which *might* have been taxed by the State. But they do not dispute that what the State *actually did* in this case was to tax the doing of business This of course is the necessary effect of *Union Oil Associations* v. *Johnson,* 2 Cal. (2nd) 727; for under that case no corporation is taxable, no matter what privileges it enjoys or exercises, unless it *does business.*

It is because the tax is one on the doing of business that *Detroit International Bridge Co.* v. *Tax Appeal Board*, 287 U. S. 295, cited by appellees, does not apply. There the excise was based on the amount of paid up capital and surplus. The tax was upon the right to transact business, but the actual transaction of business was not a condition of the tax, as it is here. Whatever the similarity in statutory language, the two acts were interpreted and applied in an entirely different way. Obviously the *Detroit* case has no application to a tax on the actual doing of business.

The inapplicability of the *Detroit Bridge* case is clearly shown by the opinion of this court in *Anglo-Chilean Nitrate Sales Corporation* v. *Alabama*, 288 U. S. 218. There, as here, the State court had held that a mere holding company, not engaged in business, was not liable for the franchise tax, from which this court drew the inevitable inference that "the exaction is laid, not upon the authorization, right or privilege to do business in Alabama, but upon the actual doing of business." This being so, the *Detroit Bridge* case was held to be inapplicable, this court saying:

> "The Alabama statute is unlike that of Michigan examined here in Detroit International Bridge Co. v. Corporation Tax Appeal Board, 287 U. S. 295 * * *. There the tax on a domestic corporation was imposed for the mere right to transact business."

With reference to the suggestion (at pages 16 and 17 of Appellees' brief) that the tax is saved because it is imposed in a given year on the basis of receipts in the preceding year, it suffices to say that this must in practice be done if in any case where the tax is measured by annual receipts, whether gross or net. This Court has not hestitated to condemn taxes levied for a given year on the basis of the previous year's receipts, where the tax was in fact a burden on interstate commerce.

New Jersey Bell Telephone Co. v. *State Board of Taxes*, 280 U. S. 338.

Appellees argue that because the tax is not an unconstitutional tax on the income of tax-exempt securities (*Pacific Co.* v. *Johnson,* 285 U. S. 480), therefore it cannot be an unconstitutional burden on interstate and foreign commerce. This involves a *non sequitur.* In the case of tax-exempt bonds, the property itself, the bonds, are not taxable, either by direct property tax or by income tax; whereas a franchise tax, measured by their income, may be immune from attack. In the case of interstate and foreign commerce the situation is reversed. The property used is taxable, but the function, the doing of business, is not. Hence, the property used in commerce may be taxed, either by direct tax or by income tax; and the incidental effect upon the function does not vitiate. But where the function itself, the doing of business in interstate and foreign commerce, is taxed, whether expressly or by actual operation of the tax, the limit of permissible action is passed and the effort to tax is vain The cases involving tax-exempt securities do not, therefore, assist in the present problem.

Little need be added on the further discussion by appellees of the "subject of the tax". After in effect conceding that the tax is one on the doing of business (at page 11), counsel assume, without argument, that the tax is one on corporate privileges (at page 19). They do not discuss or attempt to explain the actual operation of the tax, as approved in this case by the State Supreme Court, under which the tax is levied first, on the income from intrastate business and then, in addition, on a certain part of interstate business, *i. e.,* that part which originates in California. Is it not clear, in view of this actual operation, what is the "subject of the tax"? Not only is it the doing of business, but it is the doing of specific business, to-wit: all intrastate business and a definite, designated part of interstate and foreign business. This being the factual situation, is it not futile to talk about imaginary subjects such as "corporate privileges"; for they are not made any the less imaginary by the use of statutory language which is

not followed by the Courts or taxing authorities in actual enforcement?

It must be remembered that the phrase "business done within this State" or its equivalent occurs again and again in the statute. Under section 4 the tax is imposed only on corporations "doing business within the limits of this State". The tax is paid, it is said, for the privilege of exercising franchises "within this State". Under section 10, if the entire business "is not done within this State, the tax shall be * * * measured by that portion thereof which is derived from business done within this State". Now this phrase would normally be interpreted as including only intrastate business, and excluding interstate business; so this Court held in *Pacific Express Co.* v. *Siebert*, 142 U. S. 339. But in this case the State Courts held that this phrase meant not only intrastate business, but also a part of interstate and foreign business. (See opinion of State Board of Equalization, R. p. 38; opinion of Supreme Court, R. pp. 66-67) The effect of the Supreme Court decision is that this statute must be considered as if it referred to and taxed, not "business done within this State", but instead "intrastate business done within this State and also all interstate and foregin business originating in this State". If these words had been written into the statute—and this, in effect, is what the Supreme Court did—the case would present no doubt or difficulty.

It is of interest, however, that counsel say (at page 19 of their brief) that a domestic corporation "engaged exclusively in interstate commerce would not be subject to the imposition." This statement is surprising, because it seems to be contrary to the implication in the Supreme Court opinion, which only felt driven to exclude *foreign* corporations engaged exclusively in interstate business. But if counsel's concession is correct, we have another proof that the tax is one on the doing of business and on that alone. If the tax were one on the right to be, or on the grant of corporate facilities by the State, then all domestic corpora-

tions (if they came within the statutory class of business corporations and did any business at all) would be subject to the tax. The mere power to act otherwise than in interstate commerce might subject them to the tax, as it did the bridge company in the *Detroit Bridge* case, 287 U. S. 295. But it is conceded that in spite of the domestic charter and the generality of powers granted, in spite of the business character of the corporation and the fact that business is actually done, nevertheless a corporation is not taxable if the business done is exclusively interstate or foreign. This concession precludes and falsifies any possible contention that the "subject of the tax" is the right "to be," or the corporate privileges granted by the State, or anything but the actual doing of business. The only real difference between the parties is whether the subject is the doing of intrastate business only, or the doing of intrastate business and also the doing of such interstate and foreign business as originates in California. We submit that the actual operation and effect of the statute, as interpreted and applied, is such as to compel an answer in favor of the latter alternative.

Something is said, at pages 20 and 21 of the brief of appellees, about the undesirability of curtailing unnecessarily the taxing power of the State. The simple answer to this suggestion is that our claim involves no such curtailment. If section 10 had been interpreted in the State Court as not calling for an apportionment to California of a segment of interstate business,—in other words, if the phrase "business done within this State," as used in this section, had been interpreted as not including a share of commerce with territories and foreign countries,—then the State taxing scheme would have been harmonious, adequate and valid. In view of the contrary interpretation of the State Court, a simple legislative amendment will restore the natural meaning of the words and leave unimpaired the legitimate taxing power of the State. Our contention does not involve

the crippling of the taxing power, but leaves it to operate in normal fashion upon the subjects over which the State has jurisdiction.

III.

THE MEASURE OF THE TAX.

(Brief of Appellees, page 21-23)

Under this head appellees cite:

(a) *United States Glue Co.* v. *Oak Creek,* 247 U. S. 321, and other cases holding that a general income tax is valid though some of the income is derived from transactions in interstate commerce. (See brief for Appellants, pages 40-44.)

(b) *Underwood Typewriter Co.* v. *Chamberlain,* 254 U. S. 113, dealing with taxes on the franchises of a unitary business where, although income from interstate commerce is one element in a complicated formula, it is not shown that the formula is applied so as to be an actual burden on interstate commerce. (See brief for Appellants, pages 44-46.)

(c) Cases holding that the Fourteenth Amendment does not forbid the taxation of the income or intangibles of individual residents or domestic corporations, even though the income in the one case, or the intangibles in the other, derive their value from transactions outside of the jurisdiction.

None of these matters has bearing on the instant problem. The measure of this tax is not the general income as such, much less the value of the corporate excess or intangibles. The measure here, as fixed by the State Court, is first of all the income from local business and secondly and in addition the income from such interstate and foreign business as originates within the State. This, and this alone, is the measure under consideration.

The statute under consideration provides that in cases where the entire business is not done within the State, the tax shall be measured by "that portion thereof which is derived from business done within this State" (Sec. 10 of the Act). The State Supreme Court holds that the quoted clause means "that portion thereof which is derived from intrastate business done within this state and from interstate and foreign commerce originating within this state." The legal effect of the decision is to substitute the latter clause for the one which appears now on the statute book. And the only question is whether the clause thus written into the statute does or does not state a permissible measure of taxation. We submit that it does not. Certainly the cases which appellees cite do not bear on the point.

IV.

DENIAL OF EQUAL PROTECTION OF LAWS.

(Brief of Appellees, pages 24-28)

The discussion of this subject by counsel calls only for this comment: that it wholly ignores the question of the identity of the subject of the tax. Either the tax is levied on interstate commerce or, as appellees claim (brief, p. 15), it is levied "for the privilege of engaging in intrastate commerce." Only on the latter theory can the tax be saved. On this theory we have a tax for the privilege of engaging in interstate commerce, which is measured

> (a) as to some corporations, by the income from such intrastate commerce;
>
> (b) as to other corporations, including appellants, by the income from such intrastate commerce plus the income from such interstate and foreign commerce as originates in California.

The discrimination and its arbitrary character are patent. No possible justification therefor is suggested.

Reference has been made to the further discrimination in favor of the foreign corporations, competitors of appellants, who are exclusively engaged in interstate or foreign commerce and who, under the decision of the State Supreme Court, need pay no tax. It is now said that this discrimination is allowed in order that the Federal Constitution may be obeyed. (brief for Appellees, p. 26) But it is said that no constitutional restriction protects the income of domestic corporations (brief of appellees, p. 23), notwithstanding which, according to appellees, domestic corporations which are exclusively engaged in interstate commerce are not subject to the act. (brief for Appellees, p. 19) No excuse is given for the resulting discrimination between appellants and domestic corporations who are their competitors and who do the same amount of interstate business but no local business. The appellants must pay the tax, not only on their local business, but also on all interstate and foreign business originating in California. The competitors pay nothing.

One further aspect of the denial of the equal protection of the laws is brought out by the brief of appellees. They state (brief, p. 19) that domestic corporations engaged exclusively in interstate commerce are not subject to the tax. This statement, made by the State Attorney General, must be assumed to represent accurately the actual administration of the taxing statute. Accepting it, we have a case where, as between two domestic corporations similarly situated, the tax of one is measured, perhaps as to 99 per cent thereof, by its income from interstate business, and the other, doing the same amount of interstate business is not taxed at all. To such a situation the decision in *Royster Guano Co.* v. *Virginia*, 253 U. S. 412, clearly and directly applies.

V.

DUE PROCESS.

(Brief of Appellees, pages 28-29)

Our contention that due process has been denied is based upon the arbitrary character of the exaction. This question is not touched by the reply brief.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 346

MATSON NAVIGATION COMPANY (a corporation), THE OCEANIC STEAMSHIP COMPANY (a corporation), and MATSON TERMINALS, INC. (a corporation),

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, H. G. CATTELL and RAY L. RILEY, the members of said State Board of Equalization, and CHARLES J. McCOLGAN, Franchise Tax Commissioner of the State of California,

Appellees.

BRIEF OF APPELLEES

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Appellees.

BRIEF OF APPELLEES

INTRODUCTION

The appellant corporations, Matson Navigation Company, The Oceanic Steamship Co., and Matson Terminals, Inc., question the validity of a proposed

assessment of additional tax under the California Bank and Corporation Franchise Tax Act (Cal. Stats. 1929, ch. 13, as amended) in the amount of $19,637.71 for the year 1931, based on their consolidated net income for the year 1930.

The Bank and Corporation Franchise Tax Act, hereinafter referred to as the Act, was enacted March 1, 1929, pursuant to section 16 of Article XIII of the California Constitution adopted in November, 1928. Prior to the adoption of section 16, franchises of corporations (with the exception of certain public utility and insurance companies which were taxed on their gross receipts and gross premiums respectively) were taxed as property pursuant to section 14(d) of Article XIII of the Constitution. *Miller & Lux* vs. *Richardson,* 182 Cal. 115. Under section 14(d), and the statutes enacted to carry that section into effect, the State Board of Equalization assessed corporate franchises at their actual cash value and to this value the statutory rate of tax was applied. Cal. Pol. Code Sec. 3664(d). The validity of that tax as applied to The Oceanic Steamship Company, one of the appellants in this case, was sustained by this court in *Schwab* vs. *Richardson,* 263 U. S. 88, notwithstanding the fact that the value of the company's franchise arose in large part from its business in interstate and foreign commerce.

The adoption of section 16 of Article XIII changed the method of taxing financial, mercantile,

manufacturing and business corporations doing business within the limits of the state. Subdivision 2(a) of this section provided that *in lieu of* the tax imposed by section 14(d) these corporations should annually pay to the state for the privilege of exercising their corporate franchises within the state a tax according to or measured by their net income. All other corporations, i.e. corporations not financial, mercantile, manufacturing and business corporations, and corporations not doing business remained fully subject to the provisions of section 14(d).

Consistent with subdivision 2(a) of section 16, section 4 of the Bank and Corporation Franchise Tax Act enacted in 1929 to carry the constitutional provision into effect provided that "every financial, mercantile, manufacturing and business corporation doing business within the limits of this state, of the classes referred to in subdivision 2(a) of section 16 of article thirteen of the constitution of this state, shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income, to be computed, in the manner hereinafter provided, at the rate of four per centum upon the basis of its net income for the next preceding fiscal or calendar year."

Although section 4 of the Act provided that the tax for any year should be based upon net income for the next preceding fiscal or calendar year and

did not specifically exclude from the measure of the tax income from business done without the state, section 10 of the Act provided that in case the entire business of a corporation was not done within the state the tax should be according to or measured by that portion of the income which was derived from business done within the state, such portion to be determined "by an allocation upon the basis of sales, purchases, expenses of manufacture, pay roll, value and situs of tangible property, or by reference to these or other factors, or by such other method of allocation as is fairly calculated to assign to the state the portion of net income reasonably attributable to the business done within this state and to avoid subjecting the taxpayer to double taxation."

These provisions of section 10 were interpreted by the State Supreme Court when this case was before it as excluding from the measure of the tax income from business done outside the state. *Matson Navigation Company, et al.* vs. *State Board of Equalization, et al.*, 3 Cal. (2d) 1.

In view of the above provisions, it appears that the Act as it read in 1931 imposed upon financial, mercantile, manufacturing and business corporations for the privilege of exercising their corporate franchises within the state a tax according to or measured by their net income, exclusive of income from business done without the state, for the next preceding fiscal or calendar year. Furthermore,

this tax was in lieu of property taxes upon the corporations subject thereto.

The appellant corporations are all domestic corporations organized under the laws of and deriving their corporate powers and franchises from the State of California. All the corporations were actually engaged in purely intrastate business in the state during the year for which the tax in question was imposed. In addition to the privilege of doing business, all the appellant corporations obtained from the state at the time of incorporation the privilege of doing a number of things which might or might not constitute doing business depending on the manner and extent to which done, such as the right to buy, hold and sell all kinds of property including stock of other corporations, to borrow and lend money, to enter into contracts, to guarantee, underwrite or secure notes, bonds and other evidences of indebtedness of persons, firms or corporations, to execute bonds, promissory notes, etc.

During the years 1930 and 1931, the business of Matson Terminals Inc. was conducted entirely within California. Matson Navigation Co. and The Oceanic Steamship Co. in addition to their purely intrastate business engaged in the business of transportation of passengers and goods in interstate and foreign commerce between ports in California and ports in other states and foreign countries. In connection with their transportation business the

companies maintained offices in the state and facilities for the loading and unloading of freight and for the embarking and disembarking of passengers.

In their consolidated return of income for the year 1930 appellants included net income from their purely intrastate business but did not include any portion of their net income from their interstate and foreign commerce. The Franchise Tax Commissioner determined, however, that 22.2 per cent of appellant's net income from their interstate and foreign commerce was reasonably attributable to business done in California and, accordingly, recomputed the tax liability and proposed the additional assessment in question.

Upon appeal to the State Board of Equalization, the board, upon the evidence submitted to it, approved the formula employed by the Commissioner and found that 22.2 per cent of appellants' net income from its interstate and foreign commerce was reasonably attributable to business done in the state. Although an appeal was taken to the California Supreme Court from the board's decision sustaining the assessment the correctness of this finding was not questioned and is, therefore, not in issue here. Before the State Supreme Court, appellants contended that the Act should not be interpreted as requiring the inclusion in the measure of the tax any part of the net income from interstate or foreign commerce and that if it were interpreted to include any such net income, the act violated the United States Constitution. The State Supreme

Court decided against appellants on both contentions.

Since the first contention simply involves an interpretation of the California Act, the decision of the court thereon is not in issue here. Thus, the only question before this court is whether it is within the power of a state under the Constitution of the United States to impose a franchise tax upon a domestic corporation doing intrastate business within its limits for the privilege of exercising its corporate franchises within the state measured by net income which includes net income from interstate and foreign commerce reasonably attributable to business done within the state.

Appellees contend that the imposition of such a tax does not violate the Constitution of the United States.

I

THE NATURE OF THE TAX

Section 16 of Article XIII of the California Constitution by specifically making the tax in lieu of the franchise tax imposed by section 14(d) of that article demonstrates that it contemplated a tax upon the same subject as that of the tax superseded, namely, all corporate privileges.

Section 1 of Article XIII of the Constitution provided and still provides that:

> "All property in the state except as otherwise in this constitution provided, not exempt under the laws of the United States, shall be taxed in

proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, *franchises*, and all other matters and things, real, personal, and mixed, capable of private ownership; * * *." (Italics added.)

Subdivision 2a of section 16 provided:

"All financial, mercantile, manufacturing and business corporations doing business within the limits of this state, subject to be taxed pursuant to subdivision (d) of section 14 of this article, *in lieu* of the tax thereby provided for, shall annually pay to the state *for the privilege of exercising their corporate franchises within this state* a tax according to or measured by net income." (Italics added.)

Section 14(d) provided:

"All franchises other than those expressly provided for in this section, [franchises of public utility and insurance companies] shall be assessed at their actual cash value, in the manner to be provided by law * * *"

In pursuance of this constitutional provision, the legislature, in California Political Code section 3664d, provided that:

"These franchises shall include the actual exercise of the right to be a corporation and to do business as a corporation under the laws of this state and the actual exercise of the right to do business as a corporation in this state when such right is exercised by a corporation incorporated

under the laws of any other state or country, also the right, authority, privilege, or permission to maintain wharves, ferries, toll roads, and toll bridges, and to construct, maintain or operate in, under, above, upon, through or along any streets, highways, public places, or waters, any mains, pipes, canals, ditches, tanks, conduits or other means for conducting water, oil or other substances."

It is clear, therefore, that the subject of the original tax covered all privileges or rights granted by public authority.

Certain classes of corporations, i.e. those which were not mercantile, manufacturing or business corporations remained subject to this tax after the adoption of section 16, and all corporations which exercised merely the privilege of being, without doing business, remained subject thereto. The other classes of corporations were subjected by section 16 to the new tax *in lieu* of the old if they exercised the privilege of doing business. Thus all corporations receiving any privileges from the state were taxable thereon. The subject, namely, all corporate privileges, remained the same under both taxes. The measure alone varied. Under the original tax corporate franchises were taxed according to the corporate excess. *Miller & Lux* vs. *Richardson,* 182 Cal. 115. Under the new tax they are taxed according to net income. *Pacific Co.* vs. *Johnson,* 284 U. S. 480, 212 Cal. 148. If corporations did not exercise one of their corporate privileges, i.e. the doing of business, they remained subject to the original tax. If

they did exercise that privilege in addition to their other corporate privileges, they became subject to the new tax. The doing of business, therefore, did not become a new subject of taxation; it merely became a condition by which the same subject was taxed according to a new measure.

A. THE TAX BEING IN LIEU OF A PROPERTY TAX IS VALID FOR THAT REASON ALONE

This court has repeatedly upheld taxes on gross receipts from interstate commerce if in lieu of ad valorem taxes.

Maine vs. *Grand Trunk Railway Co.*, 142 U. S. 217, as explained in
Galveston Harrisburg Ry. vs. *Texas*, 210 U. S. 217;
United States Express Co. vs. *Minnesota*, 223 U. S. 335;
Pullman Co. vs. *Richardson*, 261 U. S. 330;
Cudahy Packing Co. vs. *Minn.*, 246 U. S. 450.

The tax imposed by the Act is in lieu of an ad valorem property tax upon the full cash value of appellant's franchises. See Article XIII, section 16, of the California Constitution pursuant to which the Act was passed, and section 14(d) of that article taxing corporate franchises as property. See also *Miller & Lux* vs. *Richardson*, 182 Cal. 115, unequivocally holding that the tax imposed by section 14(d) was a property tax. If in lieu taxes upon *gross* receipts do not burden interstate com-

merce *a fortiori* an in lieu tax measured by *net income* can not burden such commerce.

In *Schwab* vs. *Richardson,* 263 U. S. 88, 188 Cal. 27, it was held that the tax imposed pursuant to section 14(d) upon the value of the franchises of The Oceanic Steamship Company, one of the appellants herein, was valid notwithstanding the value of the franchises was derived from interstate and foreign commerce. In the course of its opinion in the *Schwab* case this court declared:

> "Three contentions are made against the assessment and levy. (1) They deprive the Company of its property without due process of law. (2) They are an attempt to regulate interstate and foreign commerce. (3) They are burdens upon interstate commerce.
>
> "The argument is that they have such effect because they are 'based on the value of property outside of California and on interstate and foreign commerce engaged in, so that the amount of' them 'grows in proportion to the growth of such property and commerce.'
>
> "The basis of the contention is not a new one in this Court. It is not always easy to answer and has involved difference of opinion. Any property of a corporation engaged in interstate commerce may be said to take on value from such commerce and a tax on the property be increased as the commerce increases. The cases, however, have been careful to distinquish when such effect produces illegality and when it does not.

"They have been careful to declare the immunity of interstate commerce from state taxation, but as careful to declare the power of a State to tax values within its borders though they may get enhancement from the exercise of rights outside of those borders. How intimate and direct such rights must be cannot be pronounced in formula. A state may not burden or interfere with interstate commerce or tax property outside of its borders, yet, on the other hand, it has a definite sphere of government which must not be curtailed. Certainly it is not restricted to property taxation, nor to any particular form of excises." 263 U. S. 88, 91–92.

And further on it declared:

"Plaintiff in error resists these cases, yet concedes the power of the State to tax the franchise —a 'right of its own creation' and concedes that neither the constitutional provisions nor the statute under which the tax was levied 'are on their face obnoxious to the commerce or due process clause of the Federal Constitution.' That effect is worked, it is the contention, emphasized by repetition, because the tax is based in whole or in substantial part on the value of the property outside of California, or on interstate or foreign commerce engaged in, so that the amount of it grows in proportion to the growth of such property or commerce.

"The contention and its basis are in antagonism to the cases cited and their authority. A repetition of their reasoning is unnecessary." 263 U. S. 88, 93.

If domestic corporations can be required to pay as a tax a percentage of the value of their corporate franchises, even though the value be derived from interstate or foreign commerce, and if domestic corporations can be required in lieu of such a tax to pay a percentage of their gross receipts from transactions within the state even though derived from interstate and foreign commerce, clearly they can be required in lieu of such a tax to pay a percentage of their net income from transactions within the state even though derived from interstate or foreign commerce.

B. THE SUBJECT OF THE TAX, WHETHER ON THE PRIVILEGE OF EXERCISING CORPORATE FRANCHISES WITHIN THE STATE, THE PRIVILEGE OF DOING INTRASTATE BUSINESS OR THE DOING OF INTRASTATE BUSINESS, IS UNQUESTIONABLY WITHIN THE JURISDICTION OF THE STATE

Both the constitutional provision pursuant to which the Act was passed (Cal. Const. Art. XIII, Sec. 16) and the Act itself (Sec. 4) clearly provided that the tax was imposed upon the corporations subject thereto *"for the privilege of exercising their corporate franchises"* within the state. All of the appellant corporations, being domestic, derived numerous privileges and franchises from the state which they admittedly exercised in the conduct of business and other activities purely intrastate in nature within the state during the year

for which the tax in question was imposed. There can be no doubt of the state's power to exact a tax for the exercise of such privileges and franchises within its limits.

Appellants contend, however, that the tax was upon the actual doing of business and since they were doing business in interstate or foreign commerce, it must have been on such business as well as their purely intrastate business. Even if it be conceded that the tax was upon the doing of business, there is no basis for concluding that the tax was upon the doing of business in interstate or foreign commerce. Appellants' contention would be plausible if they were engaged exclusively in interstate or foreign commerce. All of the appellants, however, were engaged in purely intrastate business during the period in question. Clearly, the state may exact a franchise tax from a domestic corporation doing intrastate business within its limits. If the corporation is doing intrastate business, the fact that it is also doing business in interstate or foreign commerce is immaterial.

Detroit International Bridge Co. vs. *Tax Appeal Board of Michigan,* 287 U. S. 295.

The tax in the *Detroit Bridge* case, as in this case, was upon a domestic corporation "for the privilege of exercising its franchise" and of transacting its business within the state. This court held in that case that since the corporation had the right to do business not within the protection of the commerce

clause it was a matter of indifference whether the corporation was engaged in interstate or foreign commerce. If the doing of business in interstate or foreign commerce is a matter of indifference when the tax is upon the *right to do* business and the corporation has the right to do intrastate business *a fortiori* the doing of business in interstate or foreign commerce is a matter of indifference when the tax is upon the *doing* of business and the corporation actually does intrastate business.

That the legislature did not intend to impose the tax upon the doing of business in interstate or foreign commerce is abundantly clear from the opinion of the California Supreme Court in this case holding that the

> "* * * act was intended to and by its terms does impose on the corporations of the type mentioned, *for the privilege of exercising their corporate franchises within this State,* the tax therein provided, whether such corporation is a foreign or domestic corporation, and whether engaged in interstate or foreign commerce or not, *so long as such corporation is doing some intrastate business as well.* We are likewise of the opinion that the act clearly, without ambiguity, imposes on foreign and domestic corporations of the classes mentioned, when they are engaged in both intrastate and interstate commerce, *for the privilege of engaging in intrastate commerce,* a franchise tax measured by or according to their net income, and that the act provides in such cases that income from

interstate or foreign commerce shall be included in measuring the tax to the extent limited in the act." (Italics added.) (Tr. Rec. p. 66.)

The decision of the California Supreme Court is controlling unless it could be established that in actual operation the Act had the effect of imposing a tax upon interstate or foreign commerce. It may be argued that such an effect results from the fact that net income from interstate and foreign commerce attributable to business done within the state is included in the measure of the tax. This argument confuses the measure with the subject of the tax.

That a corporate franchise tax measured by net income is not a tax upon the net income is no longer open to argument.

Pacific Co. vs. *Johnson,* 285 U. S. 480;
Flint vs. *Stone Tracy Co.,* 220 U. S. 107;
Educational Films Corp. vs. *Ward,* 282 U. S. 379.

If a tax measured by net income, including net income from tax exempt securities is not a tax upon such net income, or upon the securities from which derived, *a fortiori* a tax measured by net income including net income from interstate or foreign commerce is not a tax upon such net income or the business from which derived.

The distinction between subject and measure is particularly clear in the California Act because the tax for one year is measured by net income for the

preceding year. Accordingly, even if the appellants had done no business in interstate or foreign commerce during the year 1931 the tax in question measured by net income for the year 1930, including net income from interstate and foreign commerce attributable to business done in this state would nevertheless have been imposed. Conversely, if appellants had done no business in interstate or foreign commerce during the year 1930, the tax for 1931 would not have been measured in part by net income from interstate or foreign commerce, notwithstanding that appellants in 1931 did business in interstate or foreign commerce in addition to their purely intrastate business. Finally, if appellants had done business only in interstate or foreign commerce during the year 1931, they would not have been subject to the tax measured by net income for the year 1930 even though all of their 1930 net income was derived from intrastate business. It is inescapable, therefore, that the subject of the tax was not the doing of business in interstate or foreign commerce.

Appellants rely upon

Ozark Pipe Line Corp. vs. *Monier,* 266 U. S. 555;

Alpha Portland Cement Company vs. *Massachusetts,* 268 U. S. 203;

Sprout vs. *South Bend,* 277 U. S. 163;

Anglo Chilean Nitrate Sales Corporation vs. *Alabama,* 282 U. S. 212;

Cooney vs. *Mountain State Telephone and Telegraph Co.,* 294 U. S. 384.

All of these cases with the exception of the *Cooney* and *Sprout* cases involved franchise taxes on foreign corporations not engaged in intrastate business. The *Cooney* case invalidated an annual license for each telephone instrument used in the state on the ground that all of the telephone instruments were available and substantially used in interstate commerce. The *Sprout* case involved a license tax on motor busses engaged exclusively in interstate commerce (277 U. S. 163, 171).

It is clear that none of these cases has any relation to a tax on domestic corporations engaged in intrastate business for the privilege of exercising their corporate franchises in the state.

The tax is measured by net income, i.e., the fruits and benefits of the privileges granted by the state, and is accordingly increased or decreased in proportion to that net income. While the state could legitimately have considered the total net income as a measure of the value of the privileges granted and while the direct taxation of such total net income is beyond question, it nevertheless, as an insurance against multiple state taxation, limited the measure to net income attributable to sources within the state.

By section 7 of the Act net income is defined as "gross income" less certain allowed deductions, and section 6 provides that gross income,

> "includes gains, profits and income derived from the business of whatever kind and in whatever form paid; gains, profits or income from dealings

> in real or personal property gains, profits or income received as compensation for services, as interest, rents, commissions, brokerage or other fees, or otherwise received in carrying on such business all interest received from Federal, State, municipal or other bonds, and, except as hereinafter otherwise provided, all dividends received on stocks."

The tax rises or falls in accordance with the net income which in turn registers the value of the corporate privileges. The tax is imposed solely on account of corporate privileges granted by the state and not on account of interstate commerce since one engaged exclusively in interstate commerce would not be subject to the imposition and the person taxed could discontinue the intrastate business without withdrawing from the interstate business.

If it is greater because of the taxpayer's business in interstate commerce, the net income from which can in any event be taxed directly, it is also greater because of income from tax exempt securities which can not be taxed directly, and because of interest, dividends, gains and profits not derived from purely intrastate business. In *Schwab* vs. *Richardson*, 263 U. S. 88, *Underwood Typewriter Co.* vs. *Chamberlain*, 254 U. S. 113, *Bass, Ratcliff & Gretton* vs. *State Tax Commission*, 266 U. S. 271; *Hump Hairpin Co.* vs. *Emerson*, 258 U. S. 290, *Western Cartridge Co.* vs. *Emerson*, 281 U. S. 511, and all of the cases upholding the taxation of net

income from interstate commerce the amount exacted was increased because of interstate business done. There, as here, the effect upon interstate commerce was remote and incidental.

The measure of the tax is not the source of the income but the net income itself, perhaps the fairest measure of a tax on corporate privileges. It is difficult to see how the source could impair the propriety of a measure clearly related to the subject of the tax. The tax no more burdens interstate or foreign commerce than any other source of income mentioned in section 6 and has the added virtue, not present in the cases upon which appellants rely, of being upon an unquestionably proper subject, and, so far as the issues in the present case are involved, measured by elements clearly within the power of the state to tax directly.

There would seem to be no doubt about the exercise of a state's taxing power over its own creatures whenever such taxing power involves not even a remote conflict with federal power. As this court said in *Metcalf* vs. *Mitchell,* 269 U. S. 514:

> "'In a broad sense, the taxing power of either government, even when exercised in a manner admittedly necessary and proper, unavoidably has some effect upon the other. The burden of federal taxation necessarily sets an economic limit to the practical operation of the taxing power of the states, and vice versa. Taxation by either the state or the federal government affects in some measure the cost of operation of the other.

'But neither government may destroy the other nor curtail in any substantial manner the exercise of its power. Hence the limitation upon the taxing power of each, so far as it affects the other, must receive a practical construction which permits both to function with the minimum of interference each with the other; and that limitation can not be so varied or extended as seriously to impair either the taxing power of the government imposing the tax (*South Carolina* v. *United States,* 199 U. S. 437; *Flint* v. *Stone Tracy Co., supra* at page 172) or the appropriate exercise of the function of the government affected by it. *Railroad Co.* v. *Peniston,* 18 Wall. 31.' "

II

THE MEASURE OF THE TAX IS BEYOND QUESTION

The *subject* of the tax being thus unquestionably within the jurisdiction of the state to tax, it remains only to demonstrate that the *measure* is equally proper.

In *Pacific Company* vs. *Johnson,* 285 U. S. 480, this court sustained the validity of the Act now in question, in so far as it levied the tax measured in part by income from tax exempt securities which could not be taxed directly. This case compels the conclusion that net income arising in part from interstate or foreign commerce could likewise be included in the measure of the tax even if it were not subject to taxation directly. But it is

well settled that a state may directly tax net income from interstate and foreign commerce.

United States Glue Company vs. *Oak Creek,* 247 U. S. 321;
Shaffer vs. *Carter,* 252 U. S. 37;
Peck & Co. vs. *Lowe,* 247 U. S. 165;
National Paper & Type Co. vs. *Bowers,* 266 U. S. 373;
Barclay & Co. vs. *Edwards,* 267 U. S. 442;
Atlantic Coast Line Ry. vs. *Daughton,* 262 U. S. 413;
Underwood Typewriter Co. vs. *Chamberlain,* 254 U. S. 113;
Bass, Ratcliff and Gretton, Ltd. vs. *State Tax Commission,* 266 U. S. 271.

Since a state may include in the measure of a franchise tax net income not taxable directly, there can certainly be no doubt of its power to include net income which is taxable directly. Thus in the *Underwood Typewriter Co.* case this court said:

> "A tax is not obnoxious to the commerce clause merely because imposed upon property used in interstate commerce, even if it takes the form of a tax for the privilege of exercising its franchise within the State. *Postal Telegraph Cable Co.* v. *Adams,* 155 U. S. 688, 695. This tax is based upon the net profits earned within the State. That a tax measured by net profits is valid, although these profits may have been derived in part, or indeed mainly, from interstate commerce is settled. *U. S. Glue Co.* v.

Oak Creek, 247 U. S. 321; *Shaffer* v. *Carter,* 252 U. S. 37, 57; compare *Peck & Co.* v. *Lowe,* 247 U. S. 165. Whether it be deemed a property tax or a franchise tax, it is not obnoxious to the commerce clause." (254 U. S. 113, at 120.)

It is beyond question therefore that a tax measured by net income, attributable to business done in California even though derived in part from interstate or foreign commerce, imposes no burden upon interstate or foreign commerce.

As a matter of fact the state, in the case of domestic corporations such as appellants, could have imposed a tax upon, or measured its franchise tax by, the entire net income of the corporations.

Lawrence vs. *State Tax Commission,* 286 U. S. 276;

Cream of Wheat vs. *Grand Forks,* 253 U. S. 325;

Schwab vs. *Richardson,* 263 U. S. 88;

See also, *Kansas City, Memphis & Birmingham R. R. Co.* vs. *Stiles,* 242 U. S. 111.

Thus, the state not only did not burden interstate and foreign commerce but actually imposed a tax upon appellants more limited in extent than it could have imposed.

III

THE ACT DOES NOT DENY APPELLANTS THE EQUAL PROTECTION OF THE LAWS

Appellants contend that the tax constitutes a denial of equal protection of the laws by requiring of corporations engaged solely in intrastate commerce a tax measured by net income only from such commerce, whereas corporations engaged also in interstate and foreign commerce are required to pay a tax measured not only by the net income from intrastate commerce but also by the net income from interstate and foreign commerce attributable to business done within the state.

It must be observed, however, that the Act employs the same measure for all corporations taxable thereunder, i.e., net income, exclusive of net income attributable to business done outside the state. If a corporation engaged in intrastate commerce is not required to pay a tax measured in part by net income from interstate or foreign commerce, it is because it has no such net income and not because of any provision in the Act. Appellants' contention assumes that the measure is not uniform because of differences in the amounts of net income of the various corporations taxed.

As this court said in

La Belle Iron Works vs. *United States*, 256 U. S. 377, at 393:

"If in its application the tax in particular instances may seem to bear upon one corporation

more than another, *this is due to differences in their circumstance,* not to any uncertainty or want of generality in the tests applied."

See also

Barnsdall Oil Company vs. *Merriam,* 8 Fed. Supp. 185, 187.

If appellants' contention were sound it is a denial of equal protection of the laws to include any net income in the measure of the tax on corporations having net income as long as there are corporations without net income. Similarly, corporations would be denied equal protection of the laws because other corporations with less net income paid lower taxes. Such a rule would invalidate all taxation.

Appellants' contention is manifestly unsound in view of *Underwood Typewriter Co.* vs. *Chamberlain,* 354 U. S. 113, and *Bass, Ratcliff & Gretton, Ltd.* vs. *State Tax Commission,* 266 U. S. 271, since net income from interstate commerce was included in the measure of the taxes there involved, regardless of the fact that other corporations doing solely intrastate business did not pay a tax on or measured by any such net income.

Appellants argue (App. Brief, p. 53) that since a foreign corporation engaged exclusively in interstate commerce between this state and other states is not subject to the act whereas another foreign corporation doing precisely the same character and amount of interstate business is subject to the act if it does some intrastate business, the act arbi-

trarily discriminates between such corporations and the act therefore is void. In support of this contention appellants cite *Royster Guano Co.* vs. *Virginia,* 253 U. S. 412.

The *Royster Guano Company* case does not support appellants' contention. The corporations which were exempted from the tax therein involved, and the exemption of which was held to render discriminatory the tax on the corporations not exempted, could have been subjected to the tax to the same extent as the corporations taxed (see opinion of the court, p. 416) but were *voluntarily and deliberately* exempted from the tax by the statute. The situation in the instant case is different.

As clearly pointed out by the State Supreme Court in its opinion in the instant case, the exemption of corporations engaged exclusively in interstate commerce resulted solely from the fact that it is beyond the power of the state under the Federal Constitution to impose a franchise tax on such corporations. The fact that the Constitution of the United States exempts certain corporations from the tax does not prevent the application of the tax to corporations not so exempt. This proposition is unqualifiedly supported by the decision of this court in *Des Moines Bank* vs. *Fairweather,* 263 U. S. 103, sustaining a state tax on national bank shares although no deduction was allowed for the banks' investment in tax exempt securities whereas

private bankers were allowed such a deduction. In the course of its opinion this court stated:

> "Our concern here is not with a voluntary refusal or intentional omission on the part of the State to tax other moneyed capital of citizens as it taxes national bank shares, but with a submission by the State to superior laws of the United States exempting a part of the other moneyed capital from state taxation. It may be helpful to state the matter in another way. National bank shares are taxable,—made so by the congressional assent. That much or little of the bank's assets consists of tax-exempt securities of the United States does not affect the taxability of the shares,—they being distinct from the corporate assets. The State taxes such shares without regard to the exempt government securities held by the bank. The capital of private bankers is taxable, save the part invested in exempt government securities. The State taxes all of that capital, save the exempt securities. They are exempt because the United States makes them so, and the State merely respects the exemption."

Under appellants' contention, the measure of the tax could include only income from the strictly intrastate business of the corporations taxed. Thus, the same reasons that would require the exclusion of income from interstate commerce would require the exclusion of interest, rent, dividends, gains from the sale of property not made in the course of business, royalties, and numerous other types of income received by corporations not derived from their

intrastate business. (See section 6 of the Act.) The Act, however, has been held valid, notwithstanding that it requires the inclusion in its measure of net income not derived from the intrastate business, i.e., income from tax exempt securities.

Pacific Company vs. *Johnson,* 285 U. S. 480.

Clearly, if income from tax exempt securities can be included in the measure of the tax on corporations having such income, without denying them equal protection of the laws, other types of net income similarly not derived from intrastate business, including net income from interstate or foreign commerce, can be included in the measure of the tax on corporations having such net income without denying them equal protection of the laws.

IV

THE ACT DOES NOT DEPRIVE APPELLANTS OF PROPERTY WITHOUT DUE PROCESS OF LAW

The foregoing discussion, with respect to equal protection of the laws, disposes also of appellants' contention that the tax in question deprives them of property without due process of law. In addition, it may be observed that the jurisdiction of the state to impose a tax upon domestic corporations for the privilege of exercising their corporate franchises within its limits even though the corporations are

also engaged in interstate or foreign commerce is no longer open to question.

Detroit International Bridge Co. vs. *Tax Appeal Board of Mich.*, 287 U. S. 295;
Pacific Company vs. *Johnson*, 285 U. S. 480;
Western Cartridge Co. vs. *Emmerson*, 281 U. S. 511;
New York vs. *Latrobe*, 279 U. S. 421;
Hump Hairpin Co. vs. *Emmerson*, 258 U. S. 290,
and other cases too numerous to mention.

No question of double taxation or of taxing income beyond the jurisdiction of the state can arise as the measure of the tax excludes income from sources outside the state. As a matter of fact, if appellants' position is sustained there will be added to the great bulk of their net income which escapes all state or territorial taxation the amount of income in question here clearly attributable to business done within the state. See *Southern Pacific Company* vs. *Kentucky*, 222 U. S. 63.

The case of *Hans Rees' Sons, Inc.* vs. *North Carolina*, 283 U. S. 123, cited by appellants has no bearing here. That case involved the question of taxing the net income of a *foreign* corporation from business done *outside* the state. The present case involves a franchise tax on *domestic* corporations measured by net income attributable to business done *within* the state.

CONCLUSION

Appellants, as domestic corporations deriving their existence and corporate franchises from the State of California, could have been required to contribute to the support of government therein according to the entire fruits and benefits of such franchises, i.e., their entire net income including net income from interstate or foreign commerce. The state, however, not only limited the measure of the tax to net income from sources and business within the state but made that tax in lieu of a property tax upon the full value of their corporate franchises. There can thus be no just cause to complain of the reasonableness of the tax. Appellants' attack upon the Act must, therefore, be confined to questions of form. The Act, however, in this respect is invulnerable. The subject of the tax is undoubtedly within the state's jurisdiction and the propriety of the measure is beyond question.

Respectfully submitted.

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CHARLES ELMORE

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1935

No. 346

MATSON NAVIGATION COMPANY (a corporation), THE OCEANIC STEAMSHIP COMPANY (a corporation), and MATSON TERMINALS, INC. (a corporation),

Appellants,

vs.

STATE BOARD OF EQUALIZATION OF THE STATE OF CALIFORNIA, JOHN C. CORBETT, FRED E. STEWART, R. E. COLLINS, H. G. CATTELL and RAY L. RILEY, the Members of Said State Board of Equalization, and CHARLES J. McCOLGAN, Franchise Tax Commissioner of the State of California,

Appellees.

APPELLANTS' PETITION FOR A REHEARING.

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HOWARD J. FINN,
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Appellees.

APPELLANTS' PETITION FOR A REHEARING.

To the Honorable Charles Evans Hughes, Chief Justice of the United States, and to the Associate Justices of the Supreme Court of the United States:

The appellants respectfully petition for a rehearing of the above cause, on the following grounds:

The decision rendered denies the constitutional rights of appellants and is, we respectfully submit, inconsistent with doctrines heretofore recognized by this court and with the immunity of interstate and foreign commerce from the burden of state taxation.

This denial and inconsistency become apparent by adding to the statement contained in the opinion the single fact that the state statute had been construed as not applying to any corporation, whether domestic or foreign, which was not actually engaged in business. (*Union Oil Associates v. Johnson,* 2 Cal. (2d) 727.) A corporation may be foreign or domestic; its franchises may include the "right to be a corporation" or "the power to do business in corporate form"; and yet it is not subject to the tax unless it does business. Contrarywise, it must pay the tax if it does business, even though it enjoys neither the "right to be" nor "the power to do business in corporate form" as the result of California law.

In an identical situation this court has held that such a tax is one on the doing of business and not on the right to do business, even though it be called a franchise tax. (*Anglo-Chilean Corporation v. Alabama,* 288 U. S. 318.) Unless this is the rule, the actual effect of a tax may be effectively falsified by a label; and, as this court has often held, this may not be done.

Because the tax here involved is one on business actually done (as in the *Anglo-Chilean* case and for

the identical reason) the problem presented is not reached by the following statement in the court's opinion:

> "Appellants' franchises, including the right to be corporations empowered to do business in corporate form in accordance with California law, were granted to them by the state, and undoubtedly the State may tax the privilege of exercising the franchises. *St. Louis S. W. Ry. v. Arkansas,* 235 U. S. 350, 366-367; *Detroit Bridge Co. v. Tax Board,* 287 U. S. 295."

Granted that these privileges may be taxed, they were not taxed here. This court said, in the *Anglo-Chilean* case, that the *Detroit Bridge* case did not apply to a case where the actual doing of business is taxed. If so, it should not be applied here.

The present tax is not an income tax. (*Pacific Co., Ltd. v. Johnson,* 285 U. S. 480.) It is because it is an excise and not an income tax that it may be measured by the income from tax-exempt securities. (*Pacific Co., Ltd. v. Johnson,* supra.)

Neither is it a property tax, nor one in lieu of property taxes.

We are thus brought to the question whether an excise on business done may be measured by the profits from interstate and foreign commerce by "attributing" some of the interstate and foreign commerce to the local jurisdiction.

In the case of a manufacturing and mercantile business, where goods are made in one jurisdiction and later sold and delivered in another, it is proper to

"attribute" a reasonable part of the ultimate profit to the state of manufacture, and another part to the state of sale and delivery. This was done in *Bass, Ltd. v. Tax Commission*, 266 U. S. 271, and in *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113. Such reasonable apportionment to local activities did not violate the Fourteenth Amendment, and the measurement of the tax by a share of the profit did not amount to a burden on interstate commerce.

The case of a steamship company and its transportation business presents a wholly different situation from these. What it must do and does at its termini—the receipt and discharge of passengers and freight and the making of contracts of carriage—are mere incidents to its essential business of carrying persons and goods in interstate commerce. On the contrary, the factory of the manufacturer and merchant is as local as is his store or warehouse. Transportation may take place from one to the other, but such transportation merely furnishes the connection between the two localized activities. In the case of a steamship company transportation is its sole and only business. A tax on the *business* of transportation is a tax on interstate commerce itself.

This court has said on many occasions that a real burden on interstate commerce cannot be imposed by state taxation. Such a burden is attempted in the present case. The fact that appellants are engaged in wholly separable local activities cannot justify the imposition of such a burden. That these local activities are separable and have nothing to do with the income

of appellants from their transportation business appears from the stipulation of the parties. (R. 60, 61.) There is here no task of separating local from interstate and foreign business, as there was in the *Underwood* and *Bass* cases; the only income in controversy is that resulting from interstate and foreign commerce.

We call attention to the logical consequences of the decision, as follows:

(a) If any local business at all is done, the transaction of interstate business is taxable. Apparently the doing of a purely interstate business does not become free from state control unless the person or corporation engaged in it refrains from any independent local activity;

(b) Although a state may not (we assume) license the doing of interstate business by levies measured by instrumentalities, or number of transactions, it may reach the same result by a tax specifically directed at interstate business and measured by the profits therefrom;

(c) The business, the process of interstate and foreign transportation (as distinguished from property used therein, whether tangible or intangible) may now be taxed, so long as such business is denominated a measure of the value of the right to be, although the right "to be" is enjoyed in many cases without paying the tax and although the tax is paid in many other cases without enjoying the right "to be".

Implicit in the court's opinion, although not expressed therein, is the query why, if net income from interstate commerce may be included in the measure of a general state income tax, it may not also be included in the measure of a tax on the doing of business. To this query the answer seems to be clear and to consist of something more than a fine-spun distinction of theory. A general income tax is direct and akin to a tax on property; it is aimed at all avails of effort and investment; its effect on the process whereby the income is earned is remote and incidental. But an excise on the doing of business is directed at the process itself; it may be measured by income from tax-exempt property because of its very character, as this court has held; but, being directed at the process or activity, it should not be imposed on a business which is immune from taxation. The burden of an excise on the tax-exempt activity is just as real whether it be measured by the number of transactions, or the gross receipts, or the net profits. To say that the burden may be imposed by the device of measurement by net income and not otherwise is, we earnestly submit, to recognize a distinction which is not substantial and not called for by the cases which allow taxes on all property or, by direct levy, on all net incomes.

For a consideration of these questions a rehearing of this cause is respectfully requested.

Dated, San Francisco, California,
March 13, 1936.

HERMAN PHLEGER,
MAURICE E. HARRISON,
HOWARD J. FINN,
GREGORY A. HARRISON,
Counsel for Appellants and Petitioners.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above entitled cause and that in my judgment the foregoing petition for a rehearing is presented in good faith and not for delay.

Dated, San Francisco, California,
March 13, 1936.

MAURICE E. HARRISON,
Of Counsel for Appellants and Petitioners.

SUPREME COURT OF THE UNITED STATES.

No. 346.—October Term, 1935.

Matson Navigation Company, The Oceanic Steamship Company and Matson Terminals, Inc., Appellants,
vs.
State Board of Equalization of the State of California et al.

Appeal from the Supreme Court of the State of California.

[March 2, 1936.]

Mr. Justice Butler delivered the opinion of the Court.

The California Bank and Franchise Tax Act declares: Every business corporation, with exceptions not here material, "shall annually pay to the state, for the privilege of exercising its corporate franchises within this state, a tax according to or measured by its net income" to be computed at the rate of four per cent. upon that income for the preceding year. § 4. If all the corporation's business is done in California, the tax shall be computed on its entire net income; if not, on that portion which is derived from business done within the State. § 10. Net income is the revenue from all sources less expenses, losses, bad debts, taxes, depreciation, depletion, etc. §§ 6, 7 and 8.*

Appellants were incorporated under the laws of California and, for purposes of taxation, are deemed affiliated. § 14. Matson Navigation Company and the Oceanic Steamship Company, in addition to doing substantial intrastate business in California, were engaged in transportation between ports on the Pacific coast in the United States and ports in Hawaii, the South Sea Islands, Australia and New Zealand. The Matson Terminals, Inc., had no 1930 net income from interstate or foreign commerce. In March, 1931, appellants made a consolidated return showing for 1930 net income from intrastate business of $730,357.81 and from interstate and foreign business of $2,526,148.22. They maintained that the tax should not be more than four per cent. of their net income

* Act approved March 1, 1929, Cal. Stats. 1929, p. 19, as amended June 11, 1929, Cal. Stats. 1929, p. 1555.

from intrastate business. But the tax commissioner held that there should be included in the computation the part of their net income from interstate and foreign commerce that was attributable to California, found to be 22.2%, and on that basis he assessed an additional tax. The state board of equalization sustained the additional assessment. The case was taken on writ of review to the state supreme court and there, contrary to appellants' contentions, it was held that the act as construed by the tax commissioner is not repugnant to the commerce clause of the federal Constitution or to the due process or equal protection clause of the Fourteenth Amendment. 3 Cal. (2d) 1.

The only question here is whether consistently with these constitutional provisions there may be included in the base, to which the rate of four per cent. was applied, any part of net income derived from appellants' interstate and foreign commerce.

1. Does the tax burden interstate commerce? There is no controversy as to the amount, if any, that may be apportioned to California for the purpose of computing the tax. The state supreme court held that the act imposes a tax for the privilege of exercising corporate franchises and extends to every corporation, foreign or domestic, which is engaged in interstate or foreign commerce "so long as such corporation is doing some intrastate business". Appellants' franchises, including the right to be corporations empowered to do business in corporate form in accordance with California law, were granted to them by the State, and undoubtedly the State may tax the privilege of exercising the franchises. *St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 366-367. *Detroit Bridge Co.* v. *Tax Board*, 287 U. S. 295. *Anglo-Chilean Corp.* v. *Alabama*, 288 U. S. 218, 224. Unquestionably annual profits, gains or net income derived from business done within the State is an indication sufficiently significant to be deemed a reasonable base on which to compute the value of that use. Cf. *Air-Way Corp.* v. *Day*, 266 U. S. 71, 83. Our decisions demonstrate that a state tax on gross earnings derived from interstate commerce is a burden upon that commerce and repugnant to the commerce clause. *Philadelphia Steamship Co.* v. *Pennsylvania*, 122 U. S. 326. *Galveston, Harrisburg, &c. Ry. Co.* v. *Texas*, 210 U. S. 217. *Oklahoma* v. *Wells, Fargo & Co.*, 223 U. S. 298, 300. *New Jersey Tel. Co.* v. *Tax Board*, 280 U. S. 338, 346. Cf. *Pullman Co.* v. *Richardson*, 261 U. S. 330, 338. They also definitely show that a

State may tax net income derived from a domestic corporation's business—intrastate, interstate and foreign. *U. S. Glue Co.* v. *Oak Creek*, 247 U. S. 321, 328. *Shaffer* v. *Carter*, 252 U. S. 37, 57. *Atlantic Coast Line* v. *Daughton*, 262 U. S. 413, 420, 422. Cf. *Peck & Co.* v. *Lowe*, 247 U. S. 165. *National Paper Co.* v. *Bowers*, 266 U. S. 373, 377. And net income justly attributable to all classes of business done within the State may be used as the measure of a tax imposed to pay the State for the use therein of the corporate franchises granted by it. *Bass, Etc., Ltd.*, v. *Tax Comm.*, 266 U. S. 271, 277. *Underwood Typewriter Co.* v. *Chamberlain*, 254 U. S. 113, 120. Cf. *Hans Rees' Sons* v. *No. Carolina*, 283 U. S. 123, 129 *et seq.* The act as construed below does not violate the commerce clause.

2. Appellants suggest that the additional tax has no relation to the privilege of exercising their corporate franchises and that the State, by enforcing it, would deprive them of property without due process of law. They rely on *Hans Rees' Sons* v. *No. Carolina*, *supra*. We there held that a method of allocating, for taxation, to a State that part of the income of a foreign corporation which bears the same ratio to its entire net income as the value of its tangible property within that State bears to the value of all its tangible property works an unconstitutional result if the part of the income thus attributed to the State is out of all appropriate proportion to the business there transacted by the corporation. There is nothing in that decision to support appellants' contention. In that case the question was as to apportionment of income to the taxing State. The controversy now before us concerns the amount to be paid for the privilege of using in California corporate franchises granted by that State to appellants. No question of apportionment is here involved. The tax commissioner's determination, 22.2%, was not disturbed by the board of equalization or the supreme court and appellants do not in this court challenge the use of that ratio. As above shown, net income from appellants' intrastate, interstate and foreign business attributable to California may be taken into account in computing the tax. As the taxing jurisdiction of California extends to that income, the use thereof to compute the tax may not be said to be arbitrary, capricious or in violation of the due process clause of the Fourteenth Amendment.

3. Appellants insist that by enforcement of the tax in question the State would deny them the equal protection of the laws. They

say: The tax is on the doing of business; it would be void if imposed on the doing of interstate and foreign business and can only be upheld as to intrastate business. Many corporations subject to the tax, do only the latter. Others do both. The basis of the tax imposed on members of the class first mentioned is net income from intrastate business while the basis of that exacted from members of the other class is net income from all business. The act imposes no tax on corporations engaged exclusively in interstate and foreign business.

The differences portrayed in the argument of appellants do not deny them equal protection of the laws. The measure of the tax is the total net income attributable to California; it does not depend upon the net derived from business wholly within or that partly within and partly without the State. Gains from intrastate business may be wiped out by losses sustained in interstate or foreign business and vice versa. The basis of the classification is not the kind of business—whether intrastate or otherwise—from which the income is derived; it is the exclusion of all income attributable to business done outside the State. The measure of the exaction does not lack uniformity because of differences in the amounts of net incomes attributable to California. Appellants' contention is not supported by the fact that there are or may be substantial differences between amounts and sources of net incomes of corporations subject to the tax. The rate is uniform; no discrimination results from its application.

There is no merit in the suggestion that failure of the act to extend to foreign corporations exclusively engaged in interstate or foreign commerce in California constitutes an unconstitutional discrimination against appellants. A foreign corporation whose sole business in California is interstate and foreign commerce cannot be subjected to the tax in question. *Alpha Cement Co.* v. *Massachusetts,* 268 U. S. 203, 216 *et seq.* *Anglo-Chilean Corp.* v. *Alabama, supra.* The submission by the State to the commerce clause cannot be held to violate the equal protection clause. *Des Moines Bank* v. *Fairweather,* 263 U. S. 103, 116.

Judgment affirmed.